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THESIS

**THE REMOVAL OF MAHER ARAR
AND LESSONS FOR FUTURE ENGAGEMENT BETWEEN
THE UNITED STATES AND CANADA**

by

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**THE REMOVAL OF MAHER ARAR
AND LESSONS LEARNED FOR FUTURE ENGAGEMENT BETWEEN THE
UNITED STATES AND CANADA**

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ABSTRACT

Since the terrorist attacks of September 11, 2001, the United States and Canada have engaged at the highest levels of government to integrate immigration and law enforcement policies and achieve common homeland security benefits. This engagement demonstrates agreement across political parties in both countries on those areas and objectives critical to increasing North American security. Over the same period of time, the removal by the United States of Canadian citizen Maher Arar—based in part on derogatory information provided by Canadian law enforcement—illustrates vividly the complexity, sensitivity and necessity of informal collaboration between agencies in both countries. This thesis presents a case study of the removal of Mr. Arar in order to suggest strategies that policymakers in both countries may adopt in order to achieve greater progress toward the objectives identified during bilateral engagement over the past decade. This thesis relies on the unclassified results of official inquiries in the United States and Canada as well as the record developed by related litigation in both countries, and concludes that this incident itself continues to prevent further integration between the United States and Canada and should be addressed squarely to achieve greater progress toward bilateral security objectives.

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LIST OF ACRONYMS AND ABBREVIATIONS

BTB	Beyond the Border
CAT	Convention Against Torture
CBP	U.S. Customs and Border Protection
CID	Criminal Intelligence Directorate
CSIS	Canadian Security Intelligence Services
DFAIT	Department of Foreign Affairs and International Trade, Canada
DHS	Department of Homeland Security
FBI	Federal Bureau of Investigation
HSPD 2	Homeland Security Presidential Directive 2
INS	Immigration and Naturalization Services
JFK	John F. Kennedy International Airport
JTTF	Joint Terrorism Task Force
OIG	Office of Inspector General
RCMP	Royal Canadian Mounted Police
STCA	Safe Third Country Agreement
SPP	Security and Prosperity Partnership
U.S.C.	United States Code

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I. INTRODUCTION: CASE STUDY OF THE REMOVAL OF MAHER ARAR

A. PROBLEM STATEMENT AND BACKGROUND

On October 29, 2001—forty-eight days after the terrorist attacks of September 11, 2001—President George W. Bush issued Homeland Security Presidential Directive 2 (HSPD 2), “Combating Terrorism through Immigration Policies.”¹ HSPD 2 remains in effect and articulates two propositions regarding the use of United States immigration law for counterterrorism purposes and the harmonization of North American immigration policies to the maximum possible extent. First, HSPD 2 directed the United States government as a whole to deny the admission of aliens associated with, suspected of being engaged in, or supporting terrorist activity “to the maximum extent permitted by law.” Second, HSPD 2 directed the United States government to engage the governments of Canada and Mexico “to assure maximum possible compatibility of immigration, customs, and visa policies.”

Subsequently, on September 26, 2002, Maher Arar—a citizen of Syria by birth and naturalized Canadian citizen—arrived at John F. Kennedy International Airport in New York, New York, on the first half of a connecting flight from Zurich, Switzerland to Montreal, Canada. On October 7, 2002, the United States Department of Justice, Immigration and Naturalization Service found Mr. Arar “clearly and unequivocally inadmissible to the United States” by virtue of membership in Al Qaeda. On October 8, 2002, Mr. Arar was removed by the government of the United States to Amman, Jordan, and immediately thereafter was transported to a detention center near Damascus, Syria. On October 5, 2003—one year to the week from his removal from the United States—Mr. Arar was released from the custody of the government of Syria and returned to Canada, whereupon he claimed to have been systematically tortured by officials of the government of Syria.

¹ George W. Bush, “Homeland Security Presidential Directive 2 – Combating Terrorism Through Immigration Policies,” *U.S. Government Printing Office*, October 29, 2001, <http://www.gpo.gov/fdsys/pkg/PPP-2001-book2/pdf/PPP-2001-book2-doc-pg1322.pdf>.

Mr. Arar's removal, detention in the custody of Syrian military intelligence and return to Canada occurred at the same time as the governments of the United States and Canada were undertaking the first in a series of bilateral actions in order to increase the alignment in immigration and homeland security policies between the two countries in order to improve the partners' combined ability to ensure the secure flow of people into and between the two countries.

These efforts, spanning the administrations of Presidents George W. Bush and Barack Obama, share common characteristics and objectives that provide a working framework with which to evaluate the success of the United States and Canada in achieving, in the words of HSPD 2, maximum possible compatibility of immigration and visa policies.

In several significant respects, structural challenges remain to policy integration between the two countries. These challenges can be understood more clearly and constructively by policymakers in both countries by evaluating the case of the deportation to Syria by the United States of Canadian citizen Maher Arar in October 2002 based in part on information provided by the Government of Canada, and the subsequent reaction by both countries to this incident. This event simultaneously illustrates the strong affinity between the two countries as well as differences that must be understood and addressed in order to achieve even greater security collaboration between partners that will always stand in unique and critical relation to one another. Despite the effect that the Maher Arar case itself had on relations between the two countries and the significance of lessons from this case that can be applied to contemporary efforts, official discourse between the governments of the United States and Canada has not sufficiently or squarely incorporated the lessons to be learned from this case.

The goal of this research project is to derive lessons and recommendations from the case of Maher Arar that can be applied to current and future engagement with the government of Canada by the government of the United States in order to increase the ability of both to achieve further integration of immigration policies and the security objectives of HSPD 2.

B. RESEARCH QUESTION

How can the government of the United States incorporate lessons derived from a case study of the removal of Maher Arar into its engagement with the government of Canada in order to increase current and future success in achieving the security goal of maximum compatibility between the immigration laws of both countries?

Answering this question requires evaluation of several subordinate questions, specifically:

1. What security objectives do both countries seek to achieve through further law enforcement and immigration integration?
2. How does the case of the removal of Maher Arar illustrate the advantages of, and challenges to, the objectives identified in (1)?
3. Following Mr. Arar's release from Syrian custody and return to Canada, how has this case been used by opponents of bilateral integration to prevent achieving the objectives identified in (1)?
4. How can policymakers in both countries adjust current and future strategies based on a case study of Mr. Arar's removal in order to more quickly achieve the objectives identified in (1)?

This thesis relies on the answers to these questions to derive recommendations for current and future engagement by the government of the United States with the government of Canada to increase compatibility between the immigration policies for homeland security purposes.

C. METHODOLOGY

This thesis uses a single case study of the removal by the government of the United States of Canadian citizen Maher Arar to Syria in October 2002 based in part on information provided by the government of Canada, and the actions of both governments during and after Mr. Arar's detention by Syrian authorities and return in October 2003 to Canada. This case is appropriate and instructive for several reasons.

First, there is a significant amount of official and, in many cases, contemporaneous information available regarding the decisions made by United States and Canadian officials in connection with the removal of Mr. Arar. This information consists primarily, in the case of the government of Canada, of the extensive findings of

the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. In the case of the government of the United States, this information consists primarily, of the findings of an investigation by the Department of Homeland Security, Office of Inspector General as well as the record developed during litigation against the United States on behalf of Mr. Arar by the Center for Constitutional Rights and proceedings under the Military Commissions Act of 2009.

Second, with exceptions that will be discussed during the literature review, the removal of Mr. Arar has evoked asymmetrical political and popular responses in each country. There is, for example, no official statement regarding this case by United States officials that is comparable to the extensive official findings and recommendations of the Arar Commission. By comparison, the official position of the United States has been articulated through, and constrained by, litigation in the federal courts of the United States challenging the constitutionality of the actions of government officials. This asymmetry is, itself, instructive and suggests strongly that there is an opportunity and need for the government of the United States to reflect on this case and its lessons for domestic policy and international engagement with the government of Canada.

Third, the governments of the United States and Canada continue to pursue the objectives of HSPD 2 within a framework of strategic engagement that has evolved from the Security and Prosperity Partnership of North America to the Beyond the Border Working Group announced in February 2011 by President Obama and Canadian Prime Minister Stephen Harper. This framework provides an official and immediate opportunity to translate into action the recommendations suggested by the case of Mr. Arar.

This case study will be subject to certain boundaries for the following reasons. First, although both HSPD 2 and the Security and Prosperity Partnership of North America include the government of Mexico as a partner in the development of security policies intended to increase the security of North America generally, this thesis focuses exclusively on the relationship between the governments of Canada and the United States for several reasons. Citizens of Canada, historically and currently, enjoy unique status

under the immigration law of the United States that permits nationals of that country to travel to the United States more freely than citizens or nationals of Mexico.²

This unique immigration relation is codified in statute as well as bilateral agreements between the two countries. Furthermore, the length, geographic diversity and seasonal changes along the United States border with Canada pose different security challenges than the United States border with Mexico and require a border security solution that, in the words of U.S. Customs and Border Protection Commissioner Alan Bersin, “rel[ies] on intelligence, information-sharing, and strong partnerships with federal, state, local, tribal, and bi-national law enforcement agencies, as well as with the public and private sectors.”³ Finally, the government of the United States has focused in the most recent round of official declarations focused on bilateral engagements with Canada and Mexico individually—such as February 2011’s declaration announcing the Beyond the Borders initiative—in lieu of the trilateral model underlying the Security and Prosperity Partnership of North America initiative.

Second, this thesis will rely on unclassified information but acknowledges the role played by classified information and the intelligence communities of the United States and Canada in the case of Mr. Arar, as demonstrated by references throughout the official reporting by both countries, and in the larger effort to ensure the security of Canada and the United States. While the recommendations in this thesis are based entirely on the publicly-available record in order to ensure the greatest reach and applicability, it is hoped that the analysis underlying these recommendations may be useful in structuring the engagement and sharing of information between the intelligence communities of both countries. It is also anticipated that reliance on a public record will improve the reliability of the thesis’s ultimate conclusions by allowing critical comparison of these recommendations against the underlying source materials.

² 8 C.F.R. § 212.1(a) Establishing Numerous Exceptions for Canadian Citizens to the Documentary Requirements for Nonimmigrant Aliens Entering the United States.

³ “Testimony of Alan Bersin, Commissioner, U.S. Customs and Border Protection Before the Senate Judiciary Committee, Subcommittee on Immigration, Refugees and Border Security: Improving Security and Facilitating Commerce at America’s Northern Border and Ports of Entry,” *Department of Homeland Security*, May 17, 2011, http://www.dhs.gov/ynews/testimony/testimony_1305638642753.shtm.

D. CHAPTER OVERVIEW

This thesis is structured first to discuss the framework of efforts by the governments of the United States and Canada since the issuance of HSPD 2 in October 2001 to harmonize immigration policies for homeland security purposes, and next to analyze the case of Maher Arar and lessons and recommendations from that case that may be applied productively to engagement between the United States and Canada.

The research questions, scope of the case study, and objectives of this thesis have been set forth in Chapter I. The history of engagement between the United States and Canada—from the countries’ December 2001 action plan for creating a secure and smart border through the February 2011 declaration of the countries’ shared vision for “perimeter security”—will be discussed in Chapter II.

Chapter III will consist of a factual review of the case of the removal of Maher Arar, consisting of three parts. The first will provide a snapshot of the relevant United States and Canadian agencies, as they existed in 2002, and proceed to recite the events surrounding the removal in October 2002 of Mr. Arar to Jordan by the government of the United States and Mr. Arar’s subsequent transfer to the custody of Syrian military intelligence.

Chapter IV of the thesis will recite the facts of Mr. Arar’s return to Canada from Syria and evaluate the different reactions by the governments of Canada and the United States to the case. This chapter will also identify related developments in the United States and Canada since the removal of Mr. Arar in order to establish a homeland security context in which the recommendations made in this thesis can be best understood. These developments consist of litigation in Canada challenging the sufficiency of United States immigration law under international law, actions taken by the President of the United States with regard to the removal of individuals to foreign countries, and the evolution in the terrorist threat stream facing the United States and Canada since the removal of Mr. Arar.

The thesis will conclude in Chapter V by suggesting specific recommendations that can be incorporated by the United States into current and future engagement with the

government of Canada in order to move closer toward achieving the goals of the Beyond the Border Action Plan specifically and, more generally, aligning immigration policy for homeland security purposes.

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II. UNITED STATES AND CANADA ENGAGEMENT FOLLOWING SEPTEMBER 11, 2001

Forty-eight days after the terrorist attacks of September 11, 2001, the President of the United States issued Homeland Security Presidential Directive 2 (HSPD 2). HSPD 2 mandates the commencement of negotiations with Canada and Mexico “to assure maximum possible compatibility of immigration, customs, and visa policies,” for the purpose of “provid[ing] all involved countries the highest possible level of assurance that only individuals seeking entry for legitimate purposes enter any of the countries, while at the same time minimizing border restrictions that hinder legitimate trans-border commerce.”⁴

This chapter will discuss significant developments in bilateral security engagement between the United States and Canada since the terrorist attacks of September 11, 2001 that are relevant to the objectives established by HSPD 2. This chapter will then identify common principles and objectives across various initiatives. These common propositions will provide a framework within which to evaluate whether the two countries have, to date, achieved or approached “maximum” compatibility.

This chapter concludes that the dialogue between the two countries to date demonstrates clearly that there is a common understanding of the general bilateral relationship that is necessary in order to achieve North American homeland security objectives in combination with preserving the uniquely valuable trade relationship between the United States and Canada. At the same time, the continued negotiations between both countries in furtherance of goals that appear to be clearly understood suggests that underlying obstacles remain unaddressed. Subsequent chapters will derive lessons from the case study of the removal of Maher Arar by the United States following law enforcement coordination with Canadian authorities that may help policy-makers identify and address such obstacles.

⁴ Bush, “Homeland Security Presidential Directive 2.”

A. ACTION PLAN FOR CREATING A SECURE AND SMART BORDER

1. Smart Border Action Plan

On December 12, 2001, the governments of the United States and Canada jointly declared agreement on a specific set of actions known collectively as the “Secure and Smart Border Action Plain.”⁵ These actions were grouped at the time by both parties into four “pillars,” or categories: ensuring the secure flow of people into and between the two countries; ensuring the same with regard to the flow of goods; investing in, and minimizing threat to, critical infrastructure; and coordinating information sharing in support of the preceding objectives. Securing the flow of people consisted generally of the following elements: common identification of security risks; identification and interdiction of threats prior to arrival in North America through collaborative screening; and expediting the travel of individuals posing a low risk to the security of either country. These objectives were to be achieved through thirteen discrete actions, including the joint review of refugee and asylum practices and procedures to ensure thorough screening of applicants for refugee or asylum status and the negotiation of a “safe third-country agreement to enhance the handling of refugee claims.”

Coordinating information sharing in the achievement of the smart border action plan consisted generally of two objectives—creating the necessary framework to ensure timely and complete information sharing between the two countries and stronger coordination between agencies addressing common threats—that were to be achieved through eight specific actions. These actions included the “permanent” coordination of anti-terrorism and information sharing between the two countries and addressing “legal and operational” challenges to the joint removal of deportees and coordinated initiatives to “encourage uncooperative countries to accept [the return of] their nationals.”

These action items have been developed through subsequent initiatives between the two countries but serve as a baseline for the combined judgment of the two countries in the immediate aftermath of the terrorist attacks of September 11, 2001, regarding the

⁵ Office of Homeland Security, “Action Plan for Creating a Secure and Smart Border,” *The White House*, December 12, 2001, <http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020107.html>.

general objectives and specific actions necessary to achieve common homeland security in the interconnected areas of immigration and information sharing.

B. SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA

HSPD 2 and the Smart Border Declaration were followed on May 14, 2002 by the enactment of the *Enhanced Border Security and Visa Security Reform Act of 2002*,⁶ which directed the President to “study ... the feasibility of establishing a North American National Security Program to enhance the mutual security and safety of the United States, Canada, and Mexico.”

This mandate to study evolved through the Security and Prosperity Partnership of North America (SPP), a trilateral initiative among the United States, Mexico and Canada that commenced in March 2005. (Parenthetically, and as will be discussed in greater detail in Chapter III, it is significant to note that the removal of Maher Arar to Syria by the government of the United States occurred in October 2002—after the issuance of HSPD 2 and the Smart Border Declaration but several years prior to the commencement of the SPP in 2005.) As demonstrated by the name of the partnership, this initiative was organized under the complementary themes of security and partnership.

With regard to security, President Bush, Mexican President Vicente Fox and Canadian Prime Minister Paul Martin directed the officials responsible for SPP’s security portfolio to:

Establish a common approach to security to protect North America from external threats, prevent and respond to threats within North America, and to further streamline the secure and efficient movement of legitimate, low risk traffic across our shared border.⁷

Under the mandate to secure North America from external threats, the 2005 report reflected the parties’ agreement to pursue strategies on improving biometric and secure

⁶ Pub. L. No. 107–173.

⁷ “Canada-U.S. Smart Border Declaration, The Smart Border Declaration: Building a Smart Border for the 21st Century on the Foundation of a North American Zone of Confidence,” *Foreign Affairs and International Trade Canada*, December 12, 2001, <http://www.international.gc.ca/anti-terrorism/declaration-en.asp>.

documentation capabilities, immediate sharing of intelligence, common screening standards for high-risk travelers and goods, and additional measures related to radiation and biological security.

In June 2005, United States Secretary of Homeland Security Michael Chertoff, Secretary of Commerce Carlos Gutierrez and Secretary of State Condoleezza Rice in conjunction with their counterparts from the governments of Canada and Mexico delivered a report to Presidents of the United States of Mexico and Prime Minister of Canada laying out a strategy to achieve progress in these particular areas through the formation of dedicated working groups in areas including law enforcement and intelligence cooperation as well as border facilitation.⁸

The Presidents and Prime Minister proceeded to meet in March 2006, at which time the Secretaries and their counterparts delivered a progress report detailing fourteen milestones with regard to improved information sharing and law enforcement cooperation. These included three milestones designed specifically to improve cooperation to expedite the return of illegal migrants to their home countries: namely cooperation in obtaining travel documents from “uncooperative” countries for the return of their nationals, renegotiation between the United States and Canada of the reciprocal agreement between those countries for the exchange of deportees, and expansion of joint removal operations by the United States and Canada.⁹ With regard to increased intelligence cooperation among the three countries, the 2006 statement set three milestones focused on terrorist and cross-border information sharing as well as joint analysis of the overall terrorist threat to North America.

The Presidents and Prime Minister met again in Montebello, Quebec, in August 2007 and issued a joint statement in which the three leaders identified “smarter and more secure borders” as one of five priority areas for focus by the governments of all three

⁸ “Report to Leaders,” *Government of Canada*, June 2005, <http://www.spp-psp.gc.ca/eic/site/spp-psp.nsf/eng/00098.html>.

⁹ Ibid.

countries during the upcoming year.¹⁰ This statement of principles was not supported by a statement of specific initiatives and milestones comparable to those developed in 2005 and, in some cases, hedges or softens the objectives articulated earlier. By way of example, the 2007 statement declares that it is “sometimes” best to screen goods and travelers prior to entry into North America and directing further, but unspecified, cooperation in law enforcement, screening and facilitation of legitimate travelers into North America.

In April 2008, Presidents Bush and Calderon along with Prime Minister Harper met in New Orleans, Louisiana, to discuss further collaboration within the framework of the SPP in order to identify solutions to “shared challenges” while respecting each participant’s “individual and sovereign interests.”¹¹ By comparison to previous statements on the need for closer integration of immigration policy, law enforcement and intelligence collaboration, the 2008 declaration focuses on targeted improvement to port of entry and trusted traveler operations among other discrete customs filing and joint law enforcement initiatives.

C. BEYOND THE BORDER

On February 4, 2011, the governments of the United States and Canada through President Obama and Prime Minister Harper announced a shared vision for the security of the common perimeter shared by the United States and Canada. Known as “Beyond the Border,” the leaders defined this initiative as an opportunity for the two countries to develop policies to “enhance [the two countries’] security and accelerate the legitimate flow of people, goods, and services between [the] two countries.”¹²

¹⁰ Office of the Press Secretary, “Joint Statement by Prime Minister Harper, President Bush, and President Calderon,” The White House, August 21, 2007, <http://georgewbush-whitehouse.archives.gov/news/releases/2007/08/20070821-2.html>.

¹¹ “Joint Statement by President Bush, President Calderon, Prime Minister Harper - North American Leader’s Summit,” *Vive le Canada.ca*, April 22, 2008, <http://www.vivelecanada.ca/article/235929966-spp-joint-statement-by-bush-calderon-harper-april-22>.

¹² Office of the Press Secretary, “Declaration by President Obama and Prime Minister Harper of Canada - Beyond the Border,” *The White House*, February 4, 2011, <http://www.whitehouse.gov/the-press-office/2011/02/04/declaration-president-obama-and-prime-minister-harper-canada-beyond-bord>.

While the countries refer in Beyond the Border (BTB) to historic bilateral partnerships such as the free trade agreements between the United States and Canada and among the United States, Canada and Mexico, as well as the North American Aerospace Defense Command, the BTB announcement does not refer by name to the SPP. Notwithstanding the absence of references to SPP, the principles underlying BTB and the current strategy for implementation through dedicated working groups mirror in many respects, and build upon in others, on the objectives of SPP while expanding the scope of cooperation between the two countries to include both new threats and dedicated work on the protection of privacy and civil liberties in addition to those protections already in existence.

1. BTB Action Plan

BTB identifies “key areas of cooperation,” which serve as overarching guides for areas of policy integration and joint development. These include the detection and interdiction of threats prior to arrival in either the United States or Canada as well as “integrated cross-border law enforcement.” Under the heading of early threat detection, the countries committed to “improve[e] intelligence and information sharing” as part of a larger effort to “support informed risk management decisions.” The countries committed also to “work together to establish and verify the identities of travelers and conduct screening at the earliest possible opportunity.”

Under the category of further integrated law enforcement between the two countries, BTB identifies three objectives: the increased utilization of cross-designated officers and integrated operations to jointly “identify, assess, and interdict persons and organizations involved in transnational crime;” the pursuit of greater opportunities to pursue national security and transnational criminal investigations; and improved sharing among law enforcement agencies in both countries to better identify serious offenders and violent criminals.

During testimony before the United States Senate Committee on the Judiciary on October 19, 2011, United States Department of Homeland Security Secretary Janet Napolitano provided perhaps the clearest, definitive statement of current Administration

priorities to be achieved through Beyond the Border. Secretary Napolitano first, in response to questioning from Senator Charles Schumer, affirmed the general proposition that screening, and pre-screening to the extent possible, should be used to identify and devote greater resources to the examination of high-risk cargo while expediting the flow of low-risk cargo.¹³ At the time of this thesis, the administrations of President Obama and Prime Minister Harper were preparing to announce an action plan that would identify both goals and measures to achieve the objectives set forth in the initial BTB declaration by both countries.

In December 2011, President Obama and Prime Minister Stephen Harper jointly announced the action plan by which both countries proposed to achieve the objectives of Beyond the Border. This plan lays out the countries' plans to achieve progress in the areas of early threat assessment; trade facilitation and economic growth; cross-border law enforcement; and critical infrastructure and cybersecurity protection.¹⁴

In the areas of early threat assessment and cross-border law enforcement, the specific goals and mechanisms will be discussed in detail as the policy recommendations derived from the case of the removal of Maher Arar, to be discussed in Chapters Three and Four, may be applied fruitfully to the countries' goals in these areas to suggest strategies for more expeditious progress. The following specific provisions are those implicated in greater or lesser extent by the case of Mr. Arar.

In order to develop a common Canadian-United States threat assessment protocol to identify individuals posing a risk to either or both countries, the United States Office of the Director of National Intelligence, the Department of Homeland Security and Public Safety Canada are in the process of coordinating with intelligence agencies in both countries to produce "a joint inventory of existing intelligence work and a gap analysis

¹³ "Testimony of Secretary Janet Napolitano before the United States Senate Committee on the Judiciary," *Department of Homeland Security*, October 19, 2011, <http://www.dhs.gov/ynews/testimony/20111019-napolitano-mission-areas.shtm>.

¹⁴ "United States-Canada, Beyond the Border. A Shared Vision for Perimeter Security and Economic Competitiveness," *Department of Homeland Security*, February 4, 2011, <http://www.dhs.gov/xlibrary/assets/wh/us-canada-btb-action-plan.pdf>.

and identify next steps by September 30, 2012.”¹⁵ The countries further committed to sharing information and intelligence in support of both law enforcement and national security operations by, among other propositions, “[p]romoting increased informal sharing of law enforcement intelligence, information, and evidence through police and prosecutorial channels consistent with the respective domestic laws of each country.”¹⁶

There are several provisions regarding the increased exchange of criminal and immigration information in order to strengthen the combined North American perimeter of the United States-Canada border. As an aspirational goal, the countries agreed to “[c]reate a shared responsibility between the United States and Canada concerning those entering the perimeter, while facilitating ongoing efforts to streamline procedures at the United States-Canada border.”¹⁷ The December 2011 plan proposes achieving this goal initially through actions by the government of Canada to develop an electronic system for screening foreign nationals traveling to Canada that do not require a visa analogous to the United States Electronic System for Travel Authorization, and to develop pre-arrival screening procedures using advance passenger information analogous to the Advance Passenger Information System Quick Query system utilized by U.S. Customs and Border Protection.¹⁸

2. Canada’s Counter-Terrorism Strategy

In February 2012, the government of Canada released its official counter-terrorism strategy, “Building Resilience Against Terrorism.”¹⁹ This strategy states explicitly that it is intended to complement the bilateral security objectives of the United States and Canada set forth in BTB.

This strategy’s stated purpose is to counter domestic Canadian terrorism and international terrorism in order to protect Canada, its citizens and its interests.

¹⁵ Ibid., 3.

¹⁶ “United States-Canada,” 3.

¹⁷ Ibid., 8.

¹⁸ Ibid.

¹⁹ “Building Resilience Against Terrorism: Canada’s Counter-Terrorism Strategy,” *Government of Canada*, 2011, http://www.publicsafety.gc.ca/prg/ns/_fl/2012-cts-eng.pdf.

Throughout the strategy—and consistent with the mandate in the BTB action plan to strengthen informal relationships between United States and Canadian law enforcement—the government of Canada emphasizes that combating terrorism requires collaboration with the United States and other international partners and allies. Perhaps not surprisingly, the strategy also states clearly the policy of the government of Canada to act in accordance with the Canadian Charter of Rights and Freedoms and (unspecified) international legal obligations with respect to “human rights” and “humanitarian law”.²⁰ As propositions, both seem implicit in the nature of contemporary law enforcement and government; in practice, and as illustrated by the case of Mr. Arar, this thesis will argue that achieving progress toward homeland security objectives requires an acknowledgment of the areas of tension between these principles and a clear explanation of how, and why, government will act in particular cases.

The strategy proceeds to explain that the government of Canada frames its counter-terrorism objectives in terms of preventing, detecting, denying, and responding to acts of terrorism. Detection, explains the strategy, the Canadian federal government must share information efficiently within its components and externally with Canadian allies and “non-traditional international partners.” At the same time, the strategy acknowledges that the successful prosecution of individuals accused of terrorist activity “may engage the relationship between intelligence and evidence, which can represent significant disclosure challenges [between individual rights and the need to protect national security and methods.]”²¹ The strategy informs that, as of February 2012, an “extensive” review of the relationship between intelligence activities and evidentiary disclosure requirements under Canadian law is currently underway.

Parenthetically, it is significant to observe that the strategy also states explicitly that it is intended to further policy commitments by the government of Canada made in conjunction with the results of the inquiry into the investigation of Air India Flight 182, but does not explicitly reference either the case of Mr. Arar or the results of the official inquiry into that case.

²⁰ “Building Resilience,” 11.

²¹ *Ibid.*, 21.

As will be discussed in Chapter V, the government of Canada has officially and publicly reviewed its role in the case of Mr. Arar and identified a number of proscriptive actions (several of which have been taken). However this thesis argues that no opportunity should be lost by either country to squarely address the case of Mr. Arar and to highlight current policies and practices that mitigate against similar cases occurring in the future and demonstrating that increased cooperation will amplify the ability of either country to protect its citizens from terrorist attacks in the future. Proactive engagement by government officials, grounded squarely in specific policies, actions and improvements since the removal of Mr. Arar in 2002, will anticipate and offset public criticism associated with this case and will assist both countries in achieving security objectives on which there is significant agreement.

D. COMMON ELEMENTS AND CONCLUSION

Events during the decade between the issuance of HSPD 2 and the decennial anniversary of the terrorist attacks of 9/11 have demonstrated the difficulty in implementing these apparently uncontroversial propositions even with natural and willing partners such as the government of Canada. Attempted terrorist attacks by Richard Reid and Faouk Umar Abdullmutallab as well as attempted attacks against commercial cargo aircraft during this period of time have also established that relying primarily on the ability to inspect passengers and cargo upon arrival in the United States or Canada will be inadequate to address the threat posed by Islamist and potentially other terrorist groups seeking to execute attacks from overseas locations that deliberately avoid requiring terrorists to apply for admission to either country at a port of entry.

In order to illustrate the common elements across the Smart Border Accord, the SPP, and now BTB, the following word clouds have been generated from the foundation documents for each initiative. In the case of the Smart Border Accord, the word cloud was generated using the Smart Border Declaration and Action Plan. In the case of the

Security and Prosperity Partnership, the word cloud was generated using the 2005 Report to Leaders. In the case of BTB, the December 7, 2011 Action Plan was used.²²

These word clouds are presented in order to visualize for the reader, at a high level of generality, common areas of security integration and trade facilitation across all three initiatives over this decade, and across various administrations in each country.

As will be discussed further in conclusion in Chapter V, these word clouds illustrate and emphasize the importance that leaders in both countries have consistently attached to maintaining and strengthening the trade relationship between the two countries. In the preamble to the BTB Action plan—the most recent of these documents—the United States and Canada articulated the countries’ approach to trade integration and promotion through the following key propositions: “We will strive to ensure that our border crossings have the capacity to support the volume of commercial and passenger traffic inherent to economic growth and job creation on both sides of the border”; “We intend to look for opportunities to integrate our efforts and where practicable, to work together to develop joint facilities and programs—within and beyond the United States and Canada—to increase efficiency and effectiveness for both security and trade”; and “We will look for ways to reduce the cost of conducting legitimate business across the border by implementing, where practicable, common practices and streamlined procedures for customs processing and regulatory compliance.”²³ While this thesis argues that it is critical for improved engagement between both countries to understand and engage directly with the case of the removal of Mr. Arar, it is important that this engagement account for the significant pressure that both countries will exert on the agencies implementing border management issues to maximize the movement of trade between the United States and Canada with the minimal achievable delay.

²² In each case, the terms “Canada,” “United States,” “Mexico,” “America” and “American” were excluded from the final word cloud. The decision to exclude these terms was made by the author after several iterations of word cloud generation in order to eliminate those frequent terms that are not, again in the judgment of the author, of value in visualizing the substantive priorities of each document. The remaining text was then entered into the web application TagCrowd using a license purchased by the author, and a word cloud generated showing the fifty most common words in each document.

²³ “Beyond the Border,” iii-iv.

Additionally, these word clouds illustrate visually a point that is notable for its absence from the documents themselves. Of these three bilateral strategic documents, subsequent documents contain few—and in some cases, no—references to previous documents notwithstanding the significant similarities in substance. One plausible explanation may be political, as subsequent political leaders may wish not to reference the work of predecessors in different political parties; alternatively, minimal references to preceding documents may be an effort to maximize the political benefit associated with characterizing each document as a unique accomplishment. Upon review, however, it is clear that these documents should be read in sequence with each document building in principle and, in many cases, building in detail on earlier documents and efforts.

There is, in conclusion, one further observation that should be made regarding these documents that constitute the foundation for recent engagement between the United States and Canada: the government of Canada's recent counter-terrorism strategy discussed above repeatedly references that country's conception of, and commitment to, an understanding of human rights that attaches binding importance to unspecified norms of international law. The strategy document states the Canadian government's commitment to "the rule of law" in counter-terrorism operations, which includes respect for unspecified "international legal obligations, such as international human rights and humanitarian law." The fact that this commitment is emphasized in Canada's anti-terrorism strategy but not bounded by reference to specific international obligations or commitments poses challenges to the productive use of the case of Mr. Arar in future deliberations that will be discussed further in Chapter V.



Figure 1. Smart Border Declaration and Action Plan word cloud

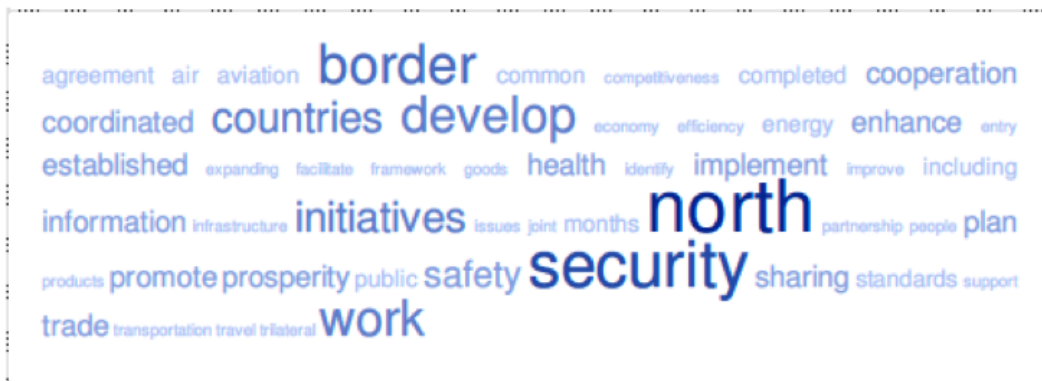


Figure 2. Security and Prosperity Partnership, Report to Leaders word cloud



Figure 3. Beyond the Border Action Plan word cloud

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III. REMOVAL OF MAHER ARAR

The following chapter reviews in detail the facts of the removal of Maher Arar from the United States, as established by the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (the Arar Commission), supplemented by the findings of the Department of Homeland Security Office of Inspector General and documents submitted in support of Mr. Arar's challenge in United States courts to the Constitutionality of his removal from the country—in particular, the October 7, 2002, declaration of the Immigration and Naturalization Service official that ordered Mr. Arar removed.

This will provide a composite, unclassified recitation of the facts underlying the removal of Mr. Arar and the interaction between the governments of Canada and the United States during the twelve days between his arrival at JFK and removal to Jordan. This statement of facts will serve to identify points of friction between the immigration and homeland security policies of the two countries. While noting the presence in some cases of classified material reviewed by government officials, it is important to emphasize that this is consistent with the statutes and regulations in place at the time of the removal of Mr. Arar and continuing in force through the completion of this thesis. These authorities contemplate and authorize the use of classified information to support immigration proceedings while shielding this information from review by the alien that is the subject of the proceedings. Specifically, 8 U.S.C. Sec. 1225(c)(2)(B) vests the Attorney General of the United States with the authority to order an alien removed from the United States without further inquiry or hearing by an immigration judge without disclosing the underlying information on which he or she relied if the Attorney General concludes that “disclosure of the information would be prejudicial to the public interest, safety, or security.” Further, 1229a(b)(4)(B) provides that an alien subject to removal proceedings is not “entitle[d] ... to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under [the Immigration and Nationality Act].”

Chapter IV will review several developments since the removal of Mr. Arar that serve as a potential source for lessons that can be incorporated into current engagement between the United States and Canada. Chapter V will then compare these recommendations against the facts of the Arar case in order to make recommendations that can be considered by decision-makers during current and future engagement between the two countries seeking to achieve the common security objectives of HSPD 2.

Finally, the following recitation deliberately presents a summary of the removal of Maher Arar compartmented according to the information provided by United States and Canadian government sources. This is intended to demonstrate to the reader the Rashomon effect implicit in operational coordination among bilateral partners acting on incomplete information in real time. This will also illustrate, notwithstanding the general language used to discuss government coordination in the Smart Border Declaration, SPP and BTB, the tensions among immigration, law enforcement and diplomatic functions within each government that must be overcome in order to achieve durable improvement in future coordination.

Since the time of the removal of Mr. Arar, there have been significant changes to the structure, authorities and policies of the governments of Canada and the United States governing immigration enforcement. The Immigration and Naturalization Service, by way of obvious example, no longer exists and has been succeeded in various respects by U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and U.S. Citizenship and Naturalization Services. Despite these changes, Mr. Arar's removal from the United States continues to be relevant to the joint achievement by the United States and Canada of the immigration and homeland security objectives of HSPD 2. For political purposes, an appreciation of the case of Mr. Arar continues to be relevant due to the contemporary citations to this case by advocacy organizations seeking to prevent further integration of United States and Canadian immigration and homeland security policy.

On February 5, 2004, the Governor General in Council of Canada directed the review of the actions of the government of Canada in relation to the detention and rendition by the United States of Maher Arar. This review was conducted by an

independent commission chaired by Dennis R. O'Connor, the then Associate Chief Justice of Ontario, which delivered its findings in September 2006. Except where otherwise noted, the following recitation of facts with regard to events in Canada is derived from the publicly available findings of the Arar Commission.

The findings of the government of Canada in the case of the rendition of Maher Arar demonstrate structural and bureaucratic dimensions of the Canadian national security regime, then and now, that are beyond the ability of the United States government to influence directly. In particular, the Commission's findings demonstrate that tensions between law enforcement and intelligence functions within Canada—including but not limited to the interaction between the Royal Canadian Mounted Police (RCMP) and the Canadian Security Intelligence Services (CSIS)—that were documented as contributing to the bombing of Air India Flight 182 in 1985 and the unsuccessful prosecution by Canadian authorities of its principal suspects were manifest in aspects of the Canadian government's handling of the case of Maher Arar. This bombing will be described in greater detail below, and should be kept in mind by American readers unfamiliar with Canadian counter-terrorism experience as a critical development in the relationship between the RCMP and CSIS within Canada in addition to being the deadliest attack against commercial aviation prior to the attacks of September 11, 2001.

The actions of the immigration, law enforcement and intelligence authorities within the governments of Canada and the United States in connection with the removal of Maher Arar are important to understand for two reasons. First, they offer one model of action under realistic operational conditions and timeframes that may recur in future interactions between the two countries. Second, the case of the removal of Maher Arar has itself attracted the attention and activism targeting past efforts at integration between the homeland security objectives of the United States and Canada. Understanding the facts of this particular case is a predicate to the recommendations that will be made in Chapter V for strategies to shape future engagement between the two countries.

In March 2008, at the request of the United States House of Representatives, Committee on the Judiciary, the U.S. Department of Homeland Security, Office of Inspector General (OIG) released its report on the removal of Maher Arar from the

United States. A redacted version of the full OIG report was received by the Center for Constitutional Rights and is available online through that organization.²⁴ Except where otherwise noted, the following recitation of facts with regard to events in the United States is derived largely from the findings of the DHS OIG. As compared to the case in Canada, where a public version of events surrounding the removal of Mr. Arar exists and is endorsed by the government of Canada, it is necessary to reconstruct the actions of United States government officials in this case from a variety of sources including the record of Mr. Arar's litigation against the United States.

A. DEVELOPMENTS PRIOR TO SEPTEMBER 26, 2002

In the case of Canada, the relationship between the Royal Canadian Mounted Police (RCMP) and the Canadian Security Intelligence Service (CSIS) began with the creation by the government of Canada of CSIS in 1984.²⁵ The structure, responsibilities and limitations of CSIS are established by statute in the Canadian Security Intelligence Service Act.²⁶ As explained by Public Safety Canada, CSIS, unlike the RCMP, specifically does not exercise law enforcement powers, but instead is an intelligence agency subject to both judicial oversight in the form of warrant requirements and internal oversight in the form of the Security Intelligence Review Committee.

Prior to the terrorist attacks of September 11, 2001, the deadliest terrorist attack on or using commercial aviation was the bombing of Air India flight 182 on June 23, 1985 by Sikh separatists based in Canada. The fraught relationship between RCMP and CSIS at the time of that attack and in the subsequent, unsuccessful prosecution by Canadian authorities of two individuals suspected in the attack—Inderjit Singh Reyat and Ripudaman Singh Malik—bears brief mention as historical context between the two agencies that would be involved later in the case of Maher Arar. On March 16, 2005,

²⁴ Department of Homeland Security, *The Removal of a Canadian Citizen to Syria*, March 2008, http://ccrjustice.org/files/Office_of_Inspector_General_Report_6.08.pdf.

²⁵ "The RCMP and CSIS: Background," *Public Safety Canada*, <http://www.publicsafety.gc.ca/prg/ns/airs/rep1-4-eng.aspx#b03>.

²⁶ "The CSIS Act," *Canadian Security Intelligence Service*, August 31, 2004, <http://www.csis-scrs.gc.ca/pblctns/ct/cssct-eng.asp>.

after nineteen months of trial and eighty witnesses called in support of the government's case against these two men, the suspects were acquitted of all charges in connection with the case.²⁷

During the trial itself, in 2003, opposition members of parliament in Canada called for an inquiry “into allegations that [CSIS] blocked the RCMP investigation into the bombing,” and that specifically CSIS “order the destruction of hours of wiretaps to conceal the fact that one of its agents ... had penetrated a circle of Sikh extremists planning the attack” and “was ordered to pull out three days before Air India Flight 182 blew up.”²⁸ In 1996, then-RCMP Inspector Gary Bass stated that, had CSIS not destroyed certain recordings of wiretapped conversations, that a successful prosecution could have been undertaken. In 2011 interview, then-RCMP Deputy Commissioner Bass reiterated his belief that RCMP investigators were deprived, in the immediate aftermath of the Air India bombing, of information in CSIS's possession regarding wiretaps and previous tests of explosive devices by suspects in the bombing that would have accelerated the investigation and prosecution of the case.²⁹

The breakdown between CSIS and the RCMP involved not only in the investigations prior to the bombing of Air India flight 182 but also the unsuccessful—and costly—prosecution that followed have been well documented by the government of Canada and the subject of recommendations for official reform.³⁰

Law enforcement in both the United States and Canada mobilized quickly and aggressively immediately after the attacks of September 11, 2001. Within approximately two weeks of September 11, 2001, the government of Canada consolidated all investigation of leads regarding the terrorist attacks under the National Security

²⁷ “In Depth: Air India; Timeline: The Trial,” *CBC News*, <http://www.cbc.ca/news/background/airindia/timeline.html>.

²⁸ Ibid.

²⁹ “RCMP Kept in the Dark About Air India: Deputy Commissioner,” *The Globe and Mail*, <http://m.theglobeandmail.com/news/national/british-columbia/rcmp-kept-in-the-dark-about-air-india-case-bass/article1934611/?service=mobile>.

³⁰ “Research Studies – Volume 1 – Threat Assessment and RCMP/CSIS Co-operation,” *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182*, 2010, http://dsp-psd.pwgsc.gc.ca/collections/collection_2010/bcp-pco/CP32-89-5-2010-1-eng.pdf.

Investigations Section of the RCMP division in Ottawa that had, prior to the attacks, been responsible for a national security portfolio including foreign embassy and designated person protection.³¹ This consolidated RCMP group was designated Project Shock and, as described to Canadian and U.S. partners at the time, was given three priorities: prevention, intelligence and prosecution. Project Shock was divided into divisions corresponding with RCMP divisions located in Ottawa, the “A” Division, and Toronto, the “O” Division.

Ottawa’s A Division shortly thereafter, in October 2001, created Project A-O Canada in order to assist in the investigation of an Ottawa resident, Abdullah Almalki, who was believed by CSIS to be connected to al-Qaeda. At this time, Project A-O Canada consisted of approximately 20 officers, mostly drawn from the RCMP but with representation also from provincial police services. The team had a liaison officer with responsibility for regularly delivering reports on Project A-O activities to CSIS and, beginning in March 2002, received CSIS personnel on detail to Project A-O. As related in the findings of the Arar Commission, the team consisted of experienced criminal investigators but possessed very limited experience in so-called national security investigations and did not have the time during the year immediately following the terrorist attacks of September 11 to receive training on either national security investigations or the threat posed specifically by Islamist terrorism. The composition of Project A-O is discussed in some detail here to provide both context for the subsequent actions of this group as well as an example for the fluid ways in which law enforcement may be reorganized in the immediate aftermath of transformative events such as September 11, 2001.

Ten days after the attacks, RCMP, FBI and Canadian Security Intelligence Service (CSIS) representatives met at CSIS representatives in order to discuss anti-terrorism cooperation among the United States and Canada. According to the Arar Commission, shortly after this meeting a request was made to RCMP and CSIS “to

³¹ “Report of the Events Relating to Maher Arar, Factual Background: Volume I,” *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, September 2006, 13, http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Vol_I_English.pdf.

investigate certain Canadian individuals who allegedly had ties to persons whom the Americans suspected to be terrorists,” although the RCMP was not then prepared to act upon this request.³²

The following recitation of facts in the case of Maher Arar will provide context for the actions of the governments of the United States and Canada in September and October 2002 by providing detail regarding the mandate and scope of Project A-O’s investigation into potential Islamist terrorist activity in Canada as well as its relationship with United States government agencies, and the Federal Bureau of Investigation in particular.

1. Project A-O Canada’s Investigation of Abdullah Almalki and Introduction to Mr. Arar

Following the September 2001 decision to grant Project A-O Canada responsibility for the investigation of Ottawa resident Abdullah Almalki, the leadership of Project A-O Canada were instructed that, given the threat environment facing Canada and the United States, the investigation of Mr. Almalki was to be conducted as an “open book investigation.” During subsequent interviews with the Commission of Inquiry, Project A-O Canada explained that, while this term was not memorialized in specific policy or guidance, it was understood by all leadership and personnel involved in the investigation to mean that historical information-sharing caveats and restrictions were to be relaxed or eliminated in order to expedite the team’s investigation.³³

Mr. Almalki was a resident of Ottawa suspected by the RCMP of facilitating the terrorist activities of Al Qaeda; Project A-O Canada assumed responsibility for the criminal investigation of Mr. Almalki who, in the words of the Commission of Inquiry, “became the focal point of Project A-O Canada’s autonomous, extensive and lengthy investigation.”³⁴

³² “Factual Background: Volume I,” 14.

³³ Ibid., 48–49

³⁴ Ibid., 51.

On October 12, 2001, RCMP surveillance teams observed a meeting between Mr. Almalki and Mr. Arar at Mango's Café and a mosque in Ottawa, Canada, for a total of approximately three hours. During this meeting, the two men were observed having a twenty-minute conversation as they walked outside in the rain.³⁵ This detail is notable due to the reliance by United States officials on this incident to support the conclusion that Mr. Arar was a member of Al-Qaeda and therefore removable from the United States.

Project A-O Canada began to investigate Mr. Arar individually and his relationship to Mr. Almalki, leading quickly to the compilation of a record of Mr. Arar's biographical, family and professional information. The team learned that Mr. Arar was born in Syria and had moved to Canada where in September 1987 he was granted immigration status as a landed immigrant and, in 1995, became a Canadian citizen. This investigation also revealed that Mr. Almalki was listed by Mr. Arar as an emergency contact on Mr. Arar's residential lease application.³⁶

In October 2001, in addition to coordinating with Canadian border security agencies in order to monitor Mr. Arar's entry into Canada, Project A-O Canada requested that the United States Customs Service conduct a search of the TECS database for any derogatory information on Mr. Arar that could be shared with Project A-O Canada, as well as requesting that TECS lookouts be created that would require United States authorities to conduct increased inspection of Mr. Arar upon his application for admission to the United States.³⁷

Project A-O Canada placed Mr. Arar's home under surveillance in November 2001, then discontinued surveillance of Mr. Arar until July 2002. In the interim, the team began in January 2002 to compile interview questions to be asked of Mr. Arar in the event the team were successful in interviewing him.

³⁵ Ibid., 53.

³⁶ Ibid., 53–54.

³⁷ Ibid., 56–57.

In November 2001, the team also reached out to the FBI to request any derogatory information in possession of the FBI that could be shared with Project A-O Canada. In making this request, Project A-O Canada advised the FBI that it was the belief of Canadian investigators that Mr. Almalki was a close associate of Mr. Arar for reasons including Mr. Almaki's identification as Mr. Arar's emergency contact on Mr. Arar's residential lease application.³⁸

Mr. Almalki departed Canada in December 2001 for Malaysia, traveling on a round-trip ticket. Mr. Almalki did not return to Canada as indicated by his travel itinerary, and in May 2002 Canadian officials became aware that Mr. Almalki was in fact in Syria and possibly in the custody of Syrian government officials. This information led to deliberations within Project A-O Canada whether to coordinate with Syrian officials to obtain information that would be useful in support of the Canadian investigation. This culminated in January 2003 with delivery by Project A-O Canada to Syria's military intelligence agency of questions to be asked of Mr. Almalki. Mr. Almalki was ultimately released from Syrian custody in August 2004 at which time he returned to Canada.³⁹

2. Project A-O Canada's Coordination with the FBI prior to September 2002

In February 2002, five FBI personnel met with Project A-O Canada, expressed an interest in Mr. Arar and other targets of Project A-O Canada's investigation, and proceeded to review the Canadian files on Mr. Arar.

The information provided at that time to FBI investigators included access to binders of information pertaining specifically to Mr. Arar and containing biographic, employment immigration and criminal information as well as the results as of that time of Project A-O Canada's investigation into Mr. Arar. In subsequent interviews to the Commission on Inquiry, Project A-O Canada members explained that this complete access granted to FBI investigators was consistent with the rules of engagement between Canadian and United States law enforcement agreed upon during a January 2002 meeting

³⁸ "Factual Background: Volume I," 57.

³⁹ Ibid., 110.

of these two and other law enforcement agencies from the two countries as well as the general direction to conduct an “open book” investigation of Mr. Arar and others.⁴⁰

In May 2002, Project A-O Canada traveled to Washington, D.C., to deliver to the FBI a presentation entitled, “The Pursuit of Terrorism: A Canadian Response.” This presentation provided information generally on the structure and objectives of Project A-O Canada’s investigations, including Mr. Almalki and, less prominently as a person of interest, Mr. Arar. At the request of the FBI, a copy of this presentation and Project A-O Canada’s notes were delivered to the FBI in July 2002.⁴¹

3. Mr. Arar’s Removal to Jordan

In July 2002, Project A-O Canada became aware that Mr. Arar and his family had departed Canada for Tunisia. Project A-O Canada shared with the FBI the fact of Mr. Arar’s departure and discussed, both internally and with the FBI, whether Mr. Arar’s departure was permanent and whether it might be related to the ongoing investigation into his relationship with Mr. Almalki.

In summary, by September 2002, Mr. Arar had been a person of interest in Project A-O Canada’s investigation into terrorist financing activities for almost one year. The team of investigators had compiled information on Mr. Arar’s personal acquaintances, business activities and biographical history that had been shared with the FBI at several points. The FBI, at meetings both in Canada and the United States, had expressed interest in Mr. Arar and the other targets of the Project A-O Canada investigation to Canadian authorities. Project A-O Canada had also requested that TECS lookouts be created in order to obtain the assistance of United States immigration and customs officials in interviewing Mr. Arar in the event he attempted to enter the United States. It is against this backdrop of investigation and communication between the two countries that Mr. Arar arrived in the United States on September 26, 2002, traveling with his family from Tunisia to Montreal, Canada.

⁴⁰ Ibid., 88–90.

⁴¹ “Factual Background: Volume I,” 102.

B. SEPTEMBER 26, 2002, THROUGH SEPTEMBER 27, 2002

1. Actions by Project A-O Canada

On approximately 12:55 p.m. on September 26, 2002, Project A-O Canada received a call from the FBI legal attaché's office in Ottawa, Canada, indicating that Mr. Arar was scheduled to arrive at JFK later that afternoon. During this phone call, the FBI legal attaché inquired, in the words of the Canadian Commission of Inquiry, whether the RCMP "had any question for Mr. Arar."⁴²

In response to this request, members of Project A-O organized and transmitted to the FBI legal attaché on September 26, 2002, a series of questions consisting of updated questions that Project A-O had sought to ask Mr. Arar in January 2002 in connection with a Canadian investigation into Mr. Arar's activities and acquaintances.⁴³

Project A-O Canada's transmission to the FBI legal attaché began with the message, "The attached pages are suggested questions for Maher ARAR as per your request. The list was one prepared earlier this year prior to Arar's sudden departure from Canada and, as such, some questions are a bit dated." The message then proceeded to enumerate questions regarding Mr. Arar's biographical information; his acquaintance with Abdullah Almalki, including why Mr. Arar and Mr. Almalki "met ... at Mango's Café, and why the two men had walked in the rain after their meal"; and his acquaintance with Ahmad El Maati.⁴⁴

In the opinion of Project A-O members interviewed afterward by the Canadian Commission of Inquiry, while detailed the questions themselves did not disclose new information to American authorities that had not already been discussed with American and other Canadian authorities, including CSIS and DFAIT, in meetings of Project A-O.

⁴² "Report of the Events Relating to Maher Arar, Factual Background: Volume II," *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, 150, http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Vol_II_English.pdf.

⁴³ *Ibid.*, 151.

⁴⁴ *Ibid.*, 152.

On September 27, 2002, Project A-O Canada staff were contacted by the FBI and advised that Mr. Arar continued to be in custody as of that time and had been interviewed by the FBI.

2. Actions by the United States Government

Mr. Arar arrived at JFK from Zurich, Switzerland at approximately 1:55 p.m. en route to Montreal, Canada. While Mr. Arar was in transit, the Department of State TIPOFF system flagged Mr. Arar as an alien of special interest to the United States government. A pre-arrival review of the manifest of Mr. Arar's flight by INS inspectors at JFK revealed that Mr. Arar was scheduled to arrive and was the subject of a lookout.⁴⁵

Upon arrival at JFK, Mr. Arar applied for admission to the United States for the purpose of continuing travel to Montreal. Mr. Arar was inspected by Immigration and Naturalization Service inspectors, who referred Mr. Arar to secondary inspection on the basis of the lookout and contacted the Joint Terrorism Task Force (JTTF). At approximately 3:00 p.m., JTTF representatives consisting of INS and Federal Bureau of Investigation special agents as well as New York City Police Department Intelligence Division detectives interviewed Mr. Arar and initially advised that Mr. Arar was not a subject of interest and returned him to the custody of the INS. The INS then permitted Mr. Arar to withdraw his application for admission and return voluntarily to Zurich, Switzerland.⁴⁶

On the evening of September 26, 2002, the leadership of the INS and the Department of Justice became aware of Mr. Arar's arrival in the United States, and convened a meeting of the Commissioner of the Immigration and Naturalization Service, the Chief of Staff of the INS and other INS personnel. Subsequent to this meeting, at the direction of the INS Eastern Regional Director, on September 27, 2002, the offer to allow Mr. Arar to voluntarily withdraw his application for admission was rescinded and Mr. Arar was detained in order to pursue removal proceedings against him.⁴⁷

⁴⁵ Department of Homeland Security, *The Removal of a Canadian*.

⁴⁶ Ibid., 6–7, 9–10.

⁴⁷ Ibid., 11.

Mr. Arar requested to call the Canadian consulate at this time but was not permitted to do so by the JTTF out of concern that such a call might jeopardize the investigation into Mr. Arar.⁴⁸ Mr. Arar subsequently was permitted to contact his family in Ottawa, Canada, who then notified Canadian consular officials.

C. SEPTEMBER 28, 2002, THROUGH OCTOBER 7, 2002

1. Actions by Project A-O Canada and the Canadian Government

On September 30, 2002, Project A-O Canada staff prepared a report summarizing the events surrounding Mr. Arar's arrival at JFK and the response to the FBI's September 26, 2002, request for suggested interview questions that demonstrates the contemporaneous confusion regarding Mr. Arar's status. According to the report, it was Project A-O Canada's understanding at that time that Mr. Arar had been removed from the United States to Zurich, Switzerland, following additional questioning by American authorities when, in fact, he remained in custody and had not been removed from the United States.⁴⁹

On October 2, 2002, having become aware of Mr. Arar's continued detention by U.S. authorities, Project A-O Canada for the first time notified Canada's Department of Foreign Affairs and International Trade (DFAIT) of Mr. Arar's detention in the United States, triggering diplomatic deliberations by DFAIT officials regarding the treatment of Mr. Arar and the outcome of the United States immigration proceedings and law enforcement investigation. These deliberations were first in parallel and then in combination with inquiries begun at the request of Mr. Arar's family into his detention following Mr. Arar's communication with his family while in American custody.

On October 3, 2002, a Canadian consular officer was permitted to meeting with Mr. Arar at the Metropolitan Detention Center. Sometime beginning on October 3 or 4, 2002, DFAIT officials became aware of allegations that Mr. Arar was associated with al-Qaeda as well as the possibility that Mr. Arar might be removed to Syria as a result of

⁴⁸ Department of Homeland Security, *The Removal of a Canadian*, 17.

⁴⁹ "Factual Background: Volume II," 156.

United States immigration proceedings.⁵⁰ As explained to the Commission of Inquiry afterward, DFAIT officials explained that this possibility was first discounted as, at most, a threat with which to extract further information from Mr. Arar given the standing, universal practice thus far to return individuals either to their country of citizenship (which in Mr. Arar's case was Canada, in addition to Syria) or his country of origin (which in Mr. Arar's case would have been Zurich, Switzerland).⁵¹

On October 3, 2002, the RCMP Criminal Intelligence Directorate (CID) was contacted on behalf of United States law enforcement with a series of questions regarding Mr. Arar, and asking for the assistance of the RCMP in providing any available information regarding those questions. The request consisted of seven questions regarding Mr. Arar's known associates and connections with other "individuals, sleeper cell members, or known terrorists." This request was forwarded to Project A-O Canada for response. During interviews conducted afterward by the Commission of Inquiry, Project A-O members advised that it was clear at that time that American officials believed Mr. Arar to be affiliated with, or connected to, Al-Qaeda.⁵²

Project A-O Canada prepared a response and, on October 4, 2002, transmitted to the FBI legal attaché through RCMP headquarters a response that provided substantive information on Mr. Arar including information regarding the relationship between Mr. Arar and Mr. Almalki and an additional reference to the October 2001 meeting between these two men in October 2001 at Mango's Café. In addition to providing this information, Project A-O Canada stated that, "while [Mr. Arar] has had contact with many individuals of interest to this project we are unable to indicate links to al-Qaida."⁵³ The response also stated that the information being provided could not be reclassified, distributed or—significantly—used without prior authorization of the RCMP or coordination with CSIS, regarding information provided by that agency to the RCMP.⁵⁴

⁵⁰ "Factual Background: Volume II," 166.

⁵¹ *Ibid.*, 165–66.

⁵² *Ibid.*, 158.

⁵³ *Ibid.*, 160.

⁵⁴ *Ibid.*

2. Actions by the United States Government

On September 28, 2002, Mr. Arar was transported from JFK to the federal Metropolitan Detention Center in Brooklyn, New York, where he was held in the most restrictive detainee facility, the Administrative Maximum Special Housing Unit.

On October 1, 2002, Mr. Arar was served with a “Notice of Temporary Inadmissibility” by the INS informing him of the government’s finding that he was inadmissible to the United States, would be removed (although it did not specify to where Mr. Arar would be removed), and that he would have five days in which to respond and dispute this finding.

On October 4, 2002, the INS Eastern Regional Director provided Mr. Arar with an opportunity to designate the country to which he wanted to be removed; Mr. Arar selected Canada. Notwithstanding this selection, between October 4, 2002, and October 6, 2002, the Commissioner of INS and General Counsel of the INS as well as attorneys from the Department of Justice, Office of the Deputy Attorney General met to consider whether to remove Mr. Arar to Syria.⁵⁵

As subsequently explained by the Department of Homeland Security, Office of Inspector General based on interviews with Department of Justice and Immigration and Naturalization officials involved in the removal of Mr. Arar, the decision was made by the then-Acting Attorney General that returning Mr. Arar to Canada would be prejudicial to the interests of the United States and that Mr. Arar’s request to be removed to Canada would therefore be denied.⁵⁶ This decision was based in part of the assessment that the “porous” border between the United States and Canada presented a threat that Mr. Arar would be able to unlawfully reenter the United States if removed to Canada.⁵⁷

On Sunday, October 6, 2002, INS asylum officers interviewed Mr. Arar beginning at approximately 9:00 p.m. until 2:30 a.m. on the morning of Monday October 7, 2002, in order to determine whether Mr. Arar possessed credible fear of persecution in

⁵⁵ Department of Homeland Security, *The Removal of a Canadian*, 20.

⁵⁶ *Ibid.*, 21.

⁵⁷ *Ibid.*

Syria and would therefore be eligible for asylum in the United States. Mr. Arar stated that he feared arrest and torture in Syria as a result of failure to perform mandatory military service in that country or because he was a Sunni Muslim. These concerns were unpersuasive to the asylum officers, and Mr. Arar was found to be ineligible for asylum in the United States.⁵⁸ This asylum interview was performed in addition to a separate assessment by INS headquarters staff whether Mr. Arar was prevented from being removed to Syria due to the obligations of the United States under the Convention against Torture.

D. OCTOBER 7, 2002, THROUGH OCTOBER 9, 2002

1. Notification to Project A-O Canada

On October 7, 2002, Project A-O Canada was notified that the questions provided to the FBI legal attaché on September 26, 2002, were used by the FBI during an interview of Mr. Arar.⁵⁹

2. Actions by the United States Government

On October 7, 2002, the Acting Attorney General wrote to INS Eastern Regional Director J. Scott Blackman advising that returning Mr. Arar to Canada would be “prejudicial to the interest of the United States” and exercising the statutory authority of the Attorney General under 8 U.S.C. § 1231(b)(2) to override the decision of Mr. Arar on the basis of protecting the interests of the United States. In subsequent interviews with investigators from the Department of Homeland Security, Office of Inspector General, individuals involved in the deliberations regarding the decision where to remove Mr. Arar, one concern with removal to Canada was that the “porous nature of the U.S.-Canadian border ... would not prevent him from returning to the United States for nefarious purposes.”⁶⁰

⁵⁸ Department of Homeland Security, *The Removal of a Canadian*, 25.

⁵⁹ *Ibid.*, 153.

⁶⁰ *Ibid.*, 21.

On October 7, 2002, Mr. Blackman executed an order finding Mr. Arar inadmissible to the United States under 8 U.S.C. § 1182(a)(3)(B)(i)(V), which renders an alien who “is a member of a terrorist organization” designated as such by statute or by the Secretary of State in consultation with, or at the direction of, the Attorney General or the Secretary of Homeland Security.⁶¹ This order simultaneously ordered Mr. Arar removed without further proceedings before an immigration judge under the procedures set forth at 8 C.F.R § 235.8. The statutory and regulatory authority of the government of the United States to select the country to which Mr. Arar or any other similarly situated alien may be removed are of particular relevance in this case and therefore will be discussed briefly in detail.

Entitled “Inadmissibility on Security and Related Grounds,” this section of the Code of Federal Regulations provides in pertinent part that a regional director may execute a final removal order against an alien, such as Mr. Arar, found to be inadmissible under § 1182(a)(3)(B). This authority is subject to the restriction that such a removal order may not be executed in a manner that violates either the Immigration and Nationality Act’s prohibition on removal to a country where an alien’s life or freedom would be threatened or the prohibition in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention Against Torture) against returning a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. For purpose of the Convention Against Torture, the term “torture” is defined to include any act by which sever physical or mental pain or suffering is intentionally inflicted on a person to extract information or inflict punishment.⁶²

Returning to the decision to remove Mr. Arar, the October 7, 2002, removal order was supported by an unclassified eight-page decision laying out certain facts related to Mr. Arar’s detention by the government of the United States as well as the information

⁶¹ “Arar Complaint With Exhibits,” October 2, 2002, <http://ccrjustice.org/files/Arar%20Complaint%20with%20Exhibits.pdf>.

⁶² “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” *Office of the United Nations High Commissioner for Human Rights*, December 10, 1984, <http://www2.ohchr.org/english/law/cat.htm>.

and rationale underlying the decision to conclude that Mr. Arar was a member of a terrorist organization and therefore inadmissible to the United States.

This decision first explained that upon Mr. Arar's arrival on September 26, 2002, at John F. Kennedy International Airport in transit to Canada, a secondary inspection established that Mr. Arar was the subject of a lookout "as being a member of a known terrorist organization." Elsewhere, the decision clarifies that this terrorist organization was Al-Qaeda. The decision explained that on October 1, 2002, Mr. Arar was charged with being inadmissible to the United States as a member of a foreign terrorist organization, given five days to respond to the charge, and served with all unclassified documents on which the government was relying in order to reach its decision. These documents included a copy of the form charging Mr. Arar as inadmissible, an attachment to this form alleging Mr. Arar to be a member of Al-Qaeda, and government publications identifying Al-Qaeda as a foreign terrorist organization and listing free legal service providers in the New York area.

The decision states the conclusion of the INS Regional Director that, upon a review of classified and unclassified information, Mr. Arar "clearly and unequivocally ... is a member of a foreign terrorist organization, to wit: Al-Qaeda," notwithstanding Mr. Arar's denial of membership in, or affiliation with, any terrorist organization.⁶³ The decision proceeds to summarize the unclassified elements of the factual record deemed most significant by the INS Regional Director in reaching this conclusion. The section summarizing the results of the FBI's interview of Mr. Arar on September 27, 2002, at JFK International Airport is reproduced in full below:

During the interview, Arar admitted his association with Abdullah Al-Malki and Abdullah Al-Malki's brother, Nazih Al-Malki. Arar advised the FBI that he was friendly with Nazih Al-Malki in Syria while they were in school together and that he [Arar] worked with Nazih Al-Malki at New Link Communications. Arar also advised the FBI that Al-Malki exports radios and one of his customers was the Pakistani military. Arar also advised that he had three business dealings with Al-Malki. Arar also admitted to the

⁶³ "Arar Complaint," 3-4.

FBI about meeting Abdullah Al-Malki at the restaurant where he and Al-Malki went outside and talked in the rain in October 2001.⁶⁴

Based on the conclusion that Mr. Arar was a member of Al-Qaeda, the INS Regional Director ordered Mr. Arar removed from the United States pursuant to § 1182(a)(3)(B)(i)(V). According to the certificate of service included in the removal order, Mr. Arar was served with this order at approximately 4:00 a.m. on October 8, 2002.

Mr. Arar was then transported by an INS “Special Response Team” to Teterboro Airport in New Jersey, flown to Dulles International Airport in Washington, D.C., and then flown in the company of an INS “Special Removal Unit” to Amman, Jordan, where he arrived on October 9, 2002, and was subsequently transferred to the custody of Syrian officials and transported to a jail located outside Damascus, Syria.⁶⁵

E. SUMMARY

The purpose of this chapter has been to provide the relevant facts surrounding the investigation by Canadian authorities into Mr. Arar and their exchange of information and cooperation with the United States, both prior to Mr. Arar’s arrival in the United States on September 26, 2002 and during the two weeks between his arrival and subsequent removal by the United States to Syria on October 8, 2002.

It must be emphasized again that this recitation of facts is based on available, unclassified information regarding the removal of Mr. Arar. This record indicates the existence of a classified appendix to the decision to remove Mr. Arar, and the working assumption must be made that additional derogatory information could exist. The case study of Mr. Arar’s removal is nonetheless highly relevant today given the depth of the unclassified record and the connections between Canadian and United States law enforcement that are revealed. In particular, while the unclassified decision of Mr. Blackman explaining the conclusion of the government of the United States that Mr. Arar was a member of Al-Qaeda does not attribute or provide a date or location for the

⁶⁴ “Arar Complaint,” 4.

⁶⁵ Department of Homeland Security, *The Removal of a Canadian*, 7.

incident, Mr. Blackman relied specifically on the incident during which Mr. Arar and Mr. Almalki were observed by RCMP surveillance outside Mango's Café in Ottawa as a basis for the actions of the United States in removing Mr. Arar.

The size and level of integration between the United States and Canada is unique in the world, and uniquely important to the homeland security objectives of the United States. This relationship was identified specifically in HSPD 2 and developed through SPP and now BTB. Coordination of immigration policies for homeland security purposes is understood as essential to the preventing individuals posing a danger to either country from entering North America generally.

The case of Mr. Arar demonstrates first that United States officials possess a significant amount of discretion both in the decision whether to permit the admission of foreign nationals to the United States and regarding the disposition of individuals to be removed to other countries. United States officials should always be expected to use these authorities and the full amount of information available to them to muscularly protect the United States and its citizens by preventing the admission of dangerous individuals.

Chapter IV will proceed to summarize the response by the governments of Canada and the United States to the removal of Maher Arar following his return to Canada in 2004 and public declarations of torture by Syrian officials while in custody. That chapter will also summarize other developments since 2002 that are relevant to addressing actual and perceived concerns arising from the case of Mr. Arar that may complicate further engagement between the United States and Canada. Chapter V will conclude by applying these sources of policy recommendations both the facts of the case of Mr. Arar and the objectives of historical and future engagements such as SPP and BTB between the United States and Canada in order to identify policy recommendations for more fruitful and expeditious engagement between the two countries.

IV. DEVELOPMENTS SUBSEQUENT TO THE REMOVAL OF MAHER ARAR

The preceding chapter set forth the facts of Mr. Arar's removal by the United States government. This chapter will summarize briefly the events surrounding Mr. Arar's transfer to Syria as well as his subsequent release from the custody of the Syrian government, return to Canada and his public advocacy and legal actions challenging the actions of both the United States and the Canadian government in connection with his removal. This chapter will put these events in the context of related developments during the decade following his removal from the United States. This chapter will conclude by identifying those developments that may serve as fruitful sources of policy recommendation or, at a minimum, consideration as the United States and Canada endeavor to strengthen current and future homeland security initiatives.

In brief, these developments include the conclusion of the official inquiry of the government of Canada into the role played by Canadian officials in the case of Maher Arar, the arguments made by Mr. Arar's counsel in his ultimately unsuccessful challenge in United States court to the constitutionality of the actions of the United States government, the arguments in favor of and against the integration of the United States and Canadian asylum systems raised during the challenge in Canadian courts to the Safe Third Country Agreement (STCA), and the 2009 conclusions and policy recommendations of the United States Special Task Force on Interrogations and Transfer Policies.

Chapter V will conclude by extracting recommendations from the above developments that may be applied to mitigate concerns raised by the case of Maher Arar and, it is hoped, therefore advance the combined ability of the United States and Canadian governments to achieve the immigration-oriented homeland security goals of HSPD 2.

A. DETENTION IN SYRIA AND RETURN TO CANADA

On February 5, 2004, the Governor General in Council of Canada directed the review of the actions of the government of Canada in relation to the detention and rendition by the United States of Maher Arar. This review was conducted by an independent commission chaired by Dennis R. O'Connor, then the Associate Chief Justice of Ontario, which delivered its findings in September 2006. Except where otherwise noted, the following recitation of events, including the following description of communications and meetings between United States and Canadian officials, is based on the findings of the official inquiry.

On October 4, 2003, then-Foreign Minister of Syria Farouk Shara'a contacted then-Foreign Minister of Canada William Graham to advise that Mr. Arar would be released in response to a formal request from the Prime Minister of Canada to Syrian President Bashar al-Assad.⁶⁶ On October 5, Syrian military intelligence contacted the Chargé D'Affaires at the Canadian embassy and requested that Canadian officials travel to the offices of the head of Syrian military intelligence, General Hassan Khalil. Canadian officials did so the same day, and Mr. Arar was released to the custody of the Canadian officials upon their arrival at the office with verbal warnings from General Khalil to the effect that Mr. Arar should continue to be monitored for affiliation with al Qaeda.⁶⁷ Mr. Arar proceeded to immediately depart Syria and traveled to Montreal, Canada, where he arrived on October 6.

During transit from Syria to Canada, Mr. Arar stated to the Canadian official accompanying him that media reports of his being subjected to electric shocks and certain other methods of physical abuse were inaccurate, but that during the first two weeks of his detention in Syrian custody he was occasionally struck physically.⁶⁸ Mr. Arar did

⁶⁶ "Factual Background: Volume II," 467.

⁶⁷ *Ibid.*, 467–68.

⁶⁸ *Ibid.*, 471.

state that prior to his transfer to Sednaya prison in August 2003 he was housed and slept in a cell measuring approximately 3' by 6' by 7', with minimal provisions for sanitation or hygiene.

Following his return to Canada and reunification with his family, Mr. Arar had several meetings with officials from the Foreign Ministry— including with Minister Graham personally—prior to speaking with the media on November 4, 2003. Mr. Arar's full statement laid out a rough chronology of events prior to Mr. Arar's removal to Syria in 2002 through his return to Canada in October 2003. (The official Canadian inquiry concedes that Mr. Arar's recitation of events in his public statement is consistent with his statements during transit from Syria to Canada and during his private meetings with Canadian officials following his return.)⁶⁹ Mr. Arar stated that upon his arrival in Syria on October 9, 2002, he was immediately and continuously through approximately October 17, 2002, interrogated by Syrian military intelligence regarding his associations and travel, if any, to Afghanistan. This interrogation included being beaten with cables and threatened with more severe physical punishment including electrocution.⁷⁰ Mr. Arar proceeded to describe in detail the conditions in which he was confined during his first ten months in the custody of Syrian military intelligence, including his continuous detention in the narrow cell described to Canadian officials during his return from Syria.

This version of events does contradict statements made by Mr. Arar to Canadian consular officials during their visits with Mr. Arar while he was in the custody of Syrian military intelligence. Contemporaneous consular records from these interviews reflect that Mr. Arar stated affirmatively that he had not been subject to physical punishment. The official government inquiry into the rendition of Mr. Arar also notes, however, the testimony of Canadian foreign affairs officials who acknowledge the possibility that Mr. Arar—then in the custody of Syrian officials—might not be able to discuss his treatment accurately due to the fear of reprisal.⁷¹

⁶⁹ "Factual Background: Volume II," 472–74.

⁷⁰ "Maher Arar: Chronology of Events," <http://maherarar.net/mahers%20story.php>.

⁷¹ "Factual Background: Volume II," 475–80.

Sections 1(B) and 1(C) will proceed to lay out and compare the official actions of the governments of Canada and the United States, including the outcome of litigation in both countries by Mr. Arar against the government officials and agencies involved in his removal to Jordan and, as he claimed, torture by Syrian military intelligence.

B. RESPONSE IN CANADA

1. Official Response by the Government of Canada

Creation of the Commission of Inquiry into the Actions of Canadian Official in Relation to Maher Arar by the Government of Canada

On January 28, 2004, the government of Canada created the Commissioner of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (“the Arar Commission”). This Commission was led by then-Associate Chief Justice of Ontario Dennis O’Connor and directed both to conduct a factual investigation into the actions of the government of Canada in connection with the removal of Mr. Arar to Syria, and to evaluate and recommend changes as necessary to the role of the Royal Canadian Mounted Police “with respect to national security.”⁷²

This report was completed between 2004 and 2006, with the Commissioner interviewing over seventy government officials and reviewing approximately 21,500 documents. In preparing its findings, the Commission requested the participation of representatives from the governments of the United States, Syria and Jordan but did not receive the cooperation of any of these governments. The Commission also—and deliberately—did not request the participation of Mr. Arar himself. In the explanation of the Commission’s final report, the decision to develop the factual record without seeking Mr. Arar’s participation was intended to achieve the “maximum amount of fairness” and to generate a report that would present Mr. Arar with a complete explanation of the events surrounding his removal. Within these parameters, the Commission report

⁷² “Report of the Events Relating to Maher Arar, Analysis and Recommendations,” *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, 2006, http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdfhttp://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf.

proceeds to report out the events preceding, during and following Mr. Arar's removal from the United States in detail with consistent, extensive citation to the basis for the Commission's findings.⁷³

While the Commission's report ultimately claims to have received the cooperation and access necessary to generate an accurate explanation of events, one event during the preparation of the report bears specific attention. Then Commissioner of the Royal Canadian Mounted Police Giuliano Zaccardelli resigned on December 6, 2006, citing his own inconsistent testimony to the Arar Commission as cause for his resignation. Commissioner Zaccardelli admitted to providing contradictory testimony on two occasions to the Commission whether the RCMP attempted to contact U.S. officials in order to "correct" information regarding Mr. Arar prior to his removal, and whether the Commissioner learned of Mr. Arar's removal while he was still in the custody of Syrian military intelligence.⁷⁴

The Commission also generated contemporaneous recommendations for changes to specific agency policy as well as principles of oversight and information-sharing that should be adopted by the government of Canada in order to (in the judgment of the Commission) prevent Canadian complicity in future actions by other governments inconsistent with Canadian Charter and international legal obligations.

The findings of the government of Canada in the case of the rendition of Maher Arar demonstrate structural and bureaucratic dimensions of the Canadian national security regime, then and now, that are beyond the ability of the United States government to influence directly. In particular, the Commission's findings demonstrate that tensions between law enforcement and intelligence functions within Canada—including but not limited to the interaction between the Royal Canadian Mounted Police and the Canadian Security Intelligence Services—that were documented as contributing to the bombing of Air India Flight 182 in 1985 and the unsuccessful prosecution by

⁷³ "Analysis and Recommendations," 9–13.

⁷⁴ "RCMP's embattled chief quits over Arar testimony," *CBC News*, December 6, 2006, <http://www.cbc.ca/news/canada/story/2006/12/06/zaccardelli.html>.

Canadian authorities of its principal suspects were manifest in aspects of the Canadian government's investigation and cooperation with the government of the United States in the case of Mr. Arar.

The policy recommendations rendered by the Commission will be discussed in Chapter V below as one aspect of a proposed strategy for more fruitful engagement between the governments of the United States and Canada.

2. Settlement of Litigation Against the Government of Canada and Engagement with the United States

Mr. Arar filed suit in Canada against the government of Canada in connection with its role providing information and assistance to the government of the United States leading to his removal to Syria. In January 2007, the government of Canada reached a settlement in which the government agreed to pay Mr. Arar \$10.5 million and issue a formal apology. In apologizing, Prime Minister Harper stated that, "to some ... that will sound like an awful lot of money, but I can tell you that the reality is, given the findings of the O'Connor commission and the unjust treatment that Mr. Arar received, that figure is within this government's realistic assessment of what Mr. Arar would have won in a lawsuit."⁷⁵

In addition to the financial settlement, the Prime Minister's letter of apology to Mr. Arar stated that the government of Canada had accepted the recommendations of the Arar Commission, had objected in writing to the governments of Syria and the United States to the treatment of Mr. Arar, and that Canada had removed Mr. Arar from Canadian "lookout lists" and requested that the government of the United States do the same.⁷⁶ During questioning in the press conference accompanying the settlement, the Prime Minister emphasized his intention and efforts to persuade the government of Canada to remove Mr. Arar from terrorist watchlists in that country and that Canada, as

⁷⁵ "Harper Apologizes for Canada's Role in Arar's 'Terrible Ordeal,'" *CanWest News Service*, January 27, 2007, <http://www.canada.com/topics/news/national/story.html?id=54e0c760-750d-4b18-9f6d-15501296a7b2&k=69081>

⁷⁶ "Unclassified Cable from American Embassy Ottawa to Secretary of State," *U.S. Department of State*, January 7, 2007, <http://www.state.gov/documents/organization/133116.pdf>.

described by the Department of State, “deserved the right to disagree with the United States when it had something substantial to disagree about.”⁷⁷ The Prime Minister also expressed his agreement with the proposition that there was not sufficient information in the possession of the government of the United States to support maintaining Mr. Arar on a terrorist watchlist.⁷⁸

At the time of the settlement and public apology, the American embassy in Ottawa released an official statement on behalf of the government of the United States characterizing Mr. Arar’s continued presence on American watchlists as “a situation where our two countries will continue to disagree.” The official statement explained that, after a thorough review, the government of the United States informed Canadian counterparts that Mr. Arar would remain on terrorist watchlists in the United States and thanked Canada for “respecting the right and responsibility of the United States to protect [its] citizens.”⁷⁹

In an April 2009 interview with Canadian news service CBC, Secretary of Homeland Security Janet Napolitano—in response to a question regarding Mr. Arar’s continued presence on American terrorist watchlists—stated that she had personally reviewed information regarding Mr. Arar and expressed “unanimity” among United States government officials that Mr. Arar should not be removed from the terrorist watchlist.

C. RESPONSE AND RELATED EVENTS IN THE UNITED STATES

1. Official Review by the Government of the United States

In December 2003, the Committee on the Judiciary of the United States House of Representatives requested that the U.S. Department of Homeland Security, Office of Inspector General (OIG) commence a review of the removal of Mr. Arar with focus on the process by which the government of the United States reached the decision to remove

⁷⁷ “Unclassified Cable.”

⁷⁸ Ibid.

⁷⁹ Ibid.

Mr. Arar to Jordan rather than Canada⁸⁰. In March 2008, the OIG released its report on the removal of Maher Arar from the United States. (An addendum to this report, dealing with the level of awareness and involvement by officials of the Department of State, was released in March 2010 but did not alter the Inspector General's 2008 conclusions with respect to the actions of the Department of Justice and the Immigration and Naturalization Service.)⁸¹

The public version of this report released in March 2008 contained only one page of text summarizing the OIG's conclusions; the section describing Mr. Arar's removal and claims of torture consisted entirely of the following: "On Tuesday, October 8, 2002, Arar was flown to Amman, Jordan, and Syrian officials later took him into custody. After Arar returned to Canada in October 2003, he alleged that he was beaten and tortured while in the custody of the Syrian government."⁸² The report stated that the documents and interviews conducted by the OIG to reconstruct the process INS used in removing Mr. Arar were protected by legal privileges and therefore not discussed.

On June 5, 2008, the Committees on the Judiciary and Foreign Affairs of the House of Representatives convened a hearing to review the findings of the OIG. The hearing transcript provides an illuminating historical context regarding the political and substantive tensions that existed during the final year of the Bush presidency with regard to the role of the Department of Homeland Security in the use of immigration authorities for counter-terrorism purposes.⁸³ For present purposes, the significance of this hearing is in the fact that it caused the public release of a redacted version of the classified version of the OIG's report. This document provides significantly greater detail regarding the actions and reasoning of United States government officials in connection with the

⁸⁰ Department of Homeland Security, Office of Inspector General. *The Removal of a Canadian Citizen to Syria*, Appendix C, March 2008, <http://www.scribd.com/doc/16550029/OIG0818-The-Removal-of-a-Canadian-Citizen-to-Syria-DHS-OIG-report-on-Maher-Arar>.

⁸¹ Department of Homeland Security, Office of Inspector General. *The Removal of a Canadian Citizen to Syria*, March 2010, http://www.oig.dhs.gov/assets/Mgmt/OIGa_08-18_Mar10.pdf.

⁸² Department of Homeland Security, Office of Inspector General. *The Removal of a Canadian Citizen to Syria (Unclassified Summary)*, March 2010, http://www.oig.dhs.gov/assets/Mgmt/OIG_08-18_Mar08.pdf.

⁸³ Department of Homeland Security, Office of Inspector General. *Report OIG-08-18, The Removal of a Canadian Citizen to Syria*, June 5, 2008, <http://foreignaffairs.house.gov/110/42724.pdf>.

removal of Mr. Arar. The testimony delivered by former Inspectors General Clark Kent Ervin and Richard Skinner delivered during this hearing lay out in detail the internal disputes between the OIG and DHS officials and officials of legacy agencies regarding access to relevant records and information.

By contrast to the statement of Justice O'Connor regarding the ability of the Arar Commission to access Canadian officials and records, upon releasing the report, the Office of Inspector General expressed its opinion that additional relevant information existed but was not made available for review due to the position of current and former officials that such information was subject to privilege from disclosure and would not be provided due to the then-pending litigation between Mr. Arar and the United States government.

The initial resistance of the United States administration to the release of a more extensive public version of the Inspector General's conclusions should be compared critically to the decision by the government of Canada to commission and empower Justice O'Connor to investigate all aspects of the Canadian government's involvement in the removal of Mr. Arar. This critical comparison is amplified by the decision of the United States government not to participate in the Canadian Arar commission. By recommending a critical comparison of the reaction in both countries, it is recommended that officials currently involved in bilateral engagement between the two countries acknowledge the dramatically different approaches taken by the two countries and be prepared to explain how the two countries will attempt to more cooperatively address future terrorism or sensitive law enforcement situations that may arise.

2. Litigation Against the Government of the United States

In 2004, the Center for Constitutional Rights—a legal advocacy organization based in New York, New York—filed suit in the United States District Court for the Eastern District of New York claiming that the actions of United States government officials in connection with the removal of Maher Arar were in violation of the Fifth Amendment of the United States Constitution, the obligations of the United States pursuant to the United Nations Convention Against Torture and Other Cruel, Inhuman

and Degrading Treatment or Punishment (the Convention Against Torture), and the Torture Victim Protection Act, 28 U.S.C. § 1350.

The district court dismissed Mr. Arar's claims, holding in pertinent part that Mr. Arar could not seek relief under his claim that the government officials had deprived him of his right to be free from physical harm because, under the facts of his removal from the United States, such claims were not justiciable "given the national security and foreign policy considerations at stake."⁸⁴ On appeal, a three-judge panel of the Court of Appeals for the Second Circuit affirmed the decision of the district court and upheld the dismissal of Mr. Arar's claims;⁸⁵ on rehearing, the full panel re-affirmed the decision of the district court and upheld the dismissal of Mr. Arar's claims.⁸⁶ The majority notably characterized the actions of the United States government in removing Mr. Arar as "extraordinary rendition," and concluded that, "in the context of extraordinary rendition, [allowing an action to proceed against policymakers] would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation."

On February 1, 2010, Mr. Arar petitioned the Supreme Court of the United States to hear an appeal of the decision of the Second Circuit.⁸⁷ Mr. Arar's briefing to the Supreme Court in favor of his appeal include a letter from Canada's Minister of Foreign Affairs to Mr. Arar's attorneys stating that, "the Government of Canada confirms that it has not at any time opposed Mr. Arar's entry into Canada."⁸⁸ The willingness of the government of Canada to make an official commitment in a United States judicial proceeding, while brief, should be recognized as an exceptional action by the Canadian

⁸⁴ Arar v. Ashcroft, 414 F.Supp.2d 250 (EDNY 2006)

⁸⁵ Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008)

⁸⁶ Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009)

⁸⁷ United States Supreme Court, "In the Supreme Court of the United States, On Petition for Writ of Certiorari to the United States, Court of Appeals for the Second Circuit," Department of Justice, <http://ccrjustice.org/files/Arar%20v%20%20Ashcroft%20Petition%20for%20Certiorari.pdf>.

⁸⁸ "Personal Letter to Mr. Paul Champ from the Minister of Foreign Affairs, The Honorable Lawrence Cannon, P. C., M. P.," April 15, 2010, http://ccrjustice.org/files/Letter%20from%20Canada's%20Minister%20of%20Foreign%20Affairs_04.15.10.pdf.

government. Notwithstanding the extensive, public investigation of Mr. Arar by Canadian law enforcement prior to his interdiction by the United States in September 2002, the government of Canada was willing to state an ongoing commitment to permit Mr. Arar to enter that country.

On June 14, 2010, the Supreme Court of the United States denied Mr. Arar's petition for rehearing, thereby ending Mr. Arar's claims in United States court that the United States government's actions in connection with his removal were an unconstitutional deprivation of his rights.

3. Trial of Omar Ahmed Khadr

Omar Ahmed Khadr was born on September 19, 1986, in Toronto, Canada; according to the facts stipulated by Mr. Khadr in his plea agreement with United States authorities, his father Ahmad Sa'id Khadr was a senior al Qaeda member with direct and continuous access to Usama bin Laden and Ayman al-Zawahiri among other al Qaeda leaders.⁸⁹ Mr. Khadr and his family moved repeatedly among Canada, Pakistan and Afghanistan during his childhood and were in Afghanistan at the time of the terrorist attacks of September 11, 2001. On July 27, 2002, Mr. Khadr was involved in a firefight with United States military forces and was subsequently captured, interrogated and detained. On April 5, 2007, the government of the United States charged Omar Ahmed Khadr with murder in violation of the law of war and conspiracy with al Qaeda in connection with the death of Sergeant Christopher Speer during the July 2002 battle.⁹⁰

According to contemporary news reports from American and Canadian media, during the trial on these charges before a military commission, U.S. Federal Bureau of Investigation Special Agent Robert Fuller testified that Mr. Khadr, during interrogation by United States authorities beginning on October 7, 2002, stated he had seen Mr. Arar at al Qaeda facilities in Afghanistan; during cross-examination by Mr. Khadr's attorneys, Special Agent Fuller was presented with notes indicating that Mr. Khadr stated during

⁸⁹ "Stipulation of Fact," *CBC News*, October 13, 2010, <http://www.cbc.ca/news/pdf/omar-khadr-charges.pdf>.

⁹⁰ "Charge Sheet," April 5, 2007, <http://www.defense.gov/news/Apr2007/Khadreferral.pdf>.

interrogation he “thought” he saw Mr. Arar and that he was not able to immediately identify Mr. Arar on the basis of photographs provided by interrogators.⁹¹

According to this testimony, Mr. Khadr was being interrogated in Afghanistan—October 2002—during the time that Mr. Arar was in the custody of the government of the United States and prior to his removal to Jordan. During questioning, Special Agent Fuller testified that he was unaware whether information obtained from the interrogation of Mr. Arar was involved in any way in Mr. Arar’s removal to Jordan.⁹²

On October 13, 2010, Mr. Khadr plead guilty to all charges against him by the government of the United States and entered into an agreement in exchange for sentencing consideration to provide information to United States authorities and, “after ... transfer[] to Canadian custody, to never enter into the United States of America or any of her territories or military installations. ... This includes United States airspace.”⁹³

As of April 2011, Mr. Khadr remained in the custody of the United States government in Guantanamo Bay, Cuba, while United States and Canadian authorities agree to the terms of his transfer to Canadian custody.⁹⁴

D. RELEVANT DEVELOPMENTS FOLLOWING THE RETURN OF MR. ARAR TO CANADA

The preceding sections provided an overview of Mr. Arar’s custody by Syrian military intelligence, his return to Canada and related events in Canada and the United States. The following section identifies additional, selective developments in Canada and the United States, which demonstrate the continued relevance of the case of the removal of Mr. Arar to collaboration between the United States and Canada.

⁹¹ “Khadr only said Arar ‘looked familiar’: FBI notes,” *The Ottawa Citizen*, January 21, 2009, http://www.canada.com/story_print.html?id=34ee0fd3-bdd9-4bbc-80a8-97b1135a2ba5&sponsor.

⁹² “Khadr couldn’t pick out Arar immediately, FBI agent admits,” *CBC News*, January 20, 2009, <http://www.cbc.ca/news/world/story/2009/01/20/khadr-hearing.html>.

⁹³ “Khadr Convening Authority Pretrial Agreement,” October 13, 2010, [http://www.defense.gov/news/Khadr%20Convening%20Authority%20Pretrial%20Agreement%20AE%20341%2013%20Oct%202010%20\(redacted\).pdf](http://www.defense.gov/news/Khadr%20Convening%20Authority%20Pretrial%20Agreement%20AE%20341%2013%20Oct%202010%20(redacted).pdf).

⁹⁴ “Omar Khadr’s transfer to Canada nears approval,” *CBC News*, March 28, 2009, <http://www.cbc.ca/news/canada/toronto/story/2012/03/28/omar-khadr-transfer-canada.html?cmp=rss>.

1. The STCA and Ensuing Litigation in Canada

In 2002, the governments of the United States and Canada executed the Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, or STCA. This agreement was identified specifically in the 2001 Smart Border Declaration as an action item to achieve closer collaboration between the two countries. While the STCA remains in force and is an example of the alignment of United States immigration and security policy as set forth by HSPD 2, challenges in Canada to the implementation of that agreement have also illustrated the political concerns, and organized opposition within Canada to further integration with the United States based, in part, on the case of Mr. Arar.

By way of background, on December 5, 2002, as part of the Smart Border Action Plan, the governments of Canada and the United States executed an agreement for cooperation in the examination of refugee status claims from nationals of third countries, known as the “Safe Third Country Agreement.” In the preamble to the agreement, the parties agreed to reiterate their joint commitment to abide by the provisions of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁹⁵

This agreement came into effect in December 2004 with the practical effect that third country nationals, i.e. citizens and nationals of countries other than the United States or Canada, are required to seek refugee status in the first country of their arrival in either the United States or Canada. With certain exceptions, this agreement prevents third country nationals from, for example, traveling from the United States to Canada and then seeking refugee status in Canada rather than the United States.

⁹⁵ “Appendix C – Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries,” *U.S. Citizenship and Immigration Services*, December 5, 2002, <http://www.uscis.gov/files/article/appendix-c.pdf>.

To date, Citizenship and Immigration Canada reports that the United States is the only country designated under Canadian law as a “safe third country” for purposes of the repatriation of individuals seeking refugee status under Canadian law.⁹⁶

The STCA itself creates a framework within which aliens seeking refugee status and encountered by either the United States or Canada will have refugee applications adjudicated by the country in which the alien was initially present.⁹⁷ The agreement is intended to increase efficiency in the adjudication of refugee claims by preventing claimants from proceeding through one country in order to apply under the laws of the other.

Canadian advocacy organizations, however, challenged the lawfulness of the STCA in Canadian court by claiming that United States law for processing refugee claims offers insufficient protections under international law. These arguments were initially upheld in 2008 by a Canadian trial court, which concluded that execution of the agreement exceeded Canada’s authority to enter into such an agreement due to deficiencies in the United States immigration system as compared to requirements imposed by international law, including the Convention Against Torture or CAT.⁹⁸ The trial court reached this conclusion in part based on the case of Mr. Arar, concluding:

While this is not the Maher Arar case and this Court is not trying that case, the Court can take judicial notice of the findings of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (the Arar Report). Although the U.S. did not participate in those proceedings, it advised the Commission that it complied with Article 3 of CAT.

The facts in the Arar case give one serious cause to doubt that assurance. It may be that the assurance is based on a narrow interpretation of Article 3 but it would be an interpretation which is at odds with Canadian understanding of the obligations under CAT. Specifically, in this regard, the applicants’ submissions and evidence that the U.S. does not comply

⁹⁶ “Canada-U.S. Safe Third Country Agreement,” *Citizenship and Immigration Canada*, July 23, 2009, <http://www.cic.gc.ca/english/department/laws-policy/menu-safethird.asp>.

⁹⁷ “Agreement Between the Government.”

⁹⁸ “Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Her Majesty the Queen,” November 29, 2007, <http://www.canlii.org/en/ca/fct/doc/2007/2007fc1262/2007fc1262.pdf>.

with Article 3 are credible. Those submissions and evidence are supported by a real life example and therefore more credible than the respondent's evidence. It was unreasonable, given the evidence, for the [Government of Canada] to conclude that the U.S. meets the standards of Article 3 of CAT.⁹⁹

On appeal, the Canadian Federal Court of Appeal reversed the decision of the trial court and held that the agreement continued to be in effect, but notably the court declined to decide whether the immigration laws and policies of the United States violated the Canadian Charter of Rights and Freedoms until such time as the question could be raised in a particular factual scenario.¹⁰⁰ By reserving this question for a future date, the Federal Court of Appeal has signaled to these and other potential litigants that the initially successful legal arguments upheld by the trial court may serve as a basis to challenge future engagement with the United States.

This litigation is perhaps the clearest example of the continuing relevance of the case of Mr. Arar to the further integration of homeland security-related immigration policy as contemplated by HSPD 2. In this case, advocacy organizations were able to initially persuade the Canadian judiciary to declare the United States immigration system deficient under Canadian law based in part on the actions of the government of the United States in removing Mr. Arar. While this decision was subsequently reversed, it was (while in effect) a formal decision of the Canadian judiciary and therefore binding on the parties involved.

In Chapter V, this thesis will argue that the United States government can and should mitigate the threat of similar judicial action in the future by squarely addressing the ways in which both countries can collaborate—and in many cases are already collaborating—in a manner that is fully consistent with United States and Canadian legal obligations.

⁹⁹ “Canadian Council for Refugees.”

¹⁰⁰ “Her Majesty the Queen v. Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe,” June 27, 2008, <http://decisions.fca-caf.gc.ca/en/2008/2008fca229/2008fca229.html>

2. United States Special Task Force on Interrogations and Transfer Policies

On January 22, 2009, President Obama signed into effect an executive order on the subject of lawful interrogations that created a “Special Interagency Task Force on Interrogation and Transfer Policies.”¹⁰¹ This task force was chaired by the Attorney General and includes the Director of National Intelligence and Secretary of Defense as Co-Vice-Chairs and the Secretary of State, the Secretary of Homeland Security, the Director of the Central Intelligence Agency, and the Chairman of the Joint Chiefs of Staff as members.

First, Section 1 of this Executive Order explicitly revokes directives, orders and regulations concerning detention or interrogation but does not refer to those that may concern the rendition or transfer to a third country by the United States of non-detained individuals. While anticipating the continued use of rendition by the United States, the executive order mandates that the Special Task Force study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.

The Special Task Force convened in 2009 chaired by J. Douglas Wilson, then Chief of the National Security Unit in the Office of the United States Attorney for the Northern District of California.

On August 24, 2009, the Special Task Force issued its recommendations to President Obama, including the recommendation that transfers pursuant to immigration proceedings, while relying on assurances from the receiving country, require the involvement of the State Department in evaluating assurances in all cases and a recommendation that the Inspector Generals of the Departments of State, Defense and

¹⁰¹ Executive Order no. 13491, *Ensuring Lawful Interrogations*, (2009).

Homeland Security prepare annually a coordinated report on transfers conducted by each of their agencies in reliance on assurances from the receiving country.

In Chapter V, this thesis argues that the review and actions undertaken by this task force should be proactively used by both countries to explain the evolution of United States policy in response to issues underlying the removal of Mr. Arar.

3. Evolution of the Terrorist Threat and United States Response

As has been documented extensively, the terrorist attacks of September 11, 2001, prompted a massive reorganization of the United States government agencies with responsibility for immigration and border security, including the elimination of the Immigration Naturalization Service and creation of U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement within the Department of Homeland Security. These new agencies have, since creation, been faced with an evolving terrorist threat.

A series of attempted terrorist attacks preceding and since September 11, 2001, utilizing commercial aviation—namely the attempted bombing of Northwest Airlines Flight 253 by Umar Farouk Abdulmutallab on December 25, 2009,¹⁰² and the October 29, 2010, attempt to detonate explosives aboard two commercial cargo aircraft en route to the United States¹⁰³—as a means of transportation or as an instrument of the terrorist attack itself illustrate that United States officials must, in order to ensure the security of the homeland, develop layered strategies that focus on the identification and interdiction of terrorists and their known associates prior to departure for the United States to the maximum possible extent.

This has led to an increase in the ability of the United States government to detect and interdict individuals attempting to travel to the United States unlawfully and with the intent to execute terrorist attacks upon arrival. For example, the deployment by U.S.

¹⁰² “Nigerian charged for trying to blow up U.S. airliner,” *Reuters Africa*, December 26, 2009, <http://af.reuters.com/article/worldNews/idAFLDE5BP03M20091226>.

¹⁰³ “Story Of The U.S.-Bound Explosives Emerges,” *National Public Radio*, October 30, 2010, <http://www.npr.org/templates/story/story.php?storyId=130935022>.

Customs and Border Protection of the Electronic System for Travel Authorization, as mandated by the Implementing Recommendations of the 9/11 Commission Act of 2007, in order to screen aliens seeking to travel by air or sea to the United States under the Visa Waiver Program represents one of the most robust efforts since September 11, 2001 to prevent the travel of individuals known or believed to be associated with terrorism from departing for the United States.¹⁰⁴ At the same time, U.S. Immigration and Customs Enforcement and the Department of State have collaborated on the deployment of Visa Security Units to embassies and consulates overseas in order to increase the ability of the United States government as a whole to more thoroughly vet alien applicants for United States visas in order to deter travel to the United States by individuals known or believed to be associated with terrorist activity.¹⁰⁵ The success of the United States government in preventing individuals believed to pose law enforcement or terrorist threats to the United States from entering the United States includes, for example, blocking more than 350 individuals suspected of connections with al Qaeda and other terrorist groups from entering the country between early 2010 and early 2011.¹⁰⁶ In the case of individuals traveling by air to the United States, this figure includes individuals detected prior to departure and therefore prevented from boarding flights altogether and those identified en route and inspected upon arrival in the United States.¹⁰⁷

Chapter V of this thesis will argue that an explicit connection should be made between the shift in capabilities and focus by both the United States and Canada toward the pre-arrival detection and interdiction of potential criminal and terrorist threats and how these changes mitigate the possible recurrence of a scenario similar to that of Mr. Arar.

¹⁰⁴ “Department of Homeland Security (DHS) Has Implemented the Electronic System for Travel Authorization, but Further Steps Needed to Address Potential Program Risks,” *U.S. Government Accountability Office*, May 2011, <http://www.gao.gov/new.items/d11335.pdf>.

¹⁰⁵ “Strengthened Visa Process Would Benefit from Improvements in Staffing and Information Sharing,” *U.S. Government Accountability Office*, September 2005, <http://www.gao.gov/assets/250/247740.pdf>.

¹⁰⁶ Jennifer Epstein, “New rules barred terror-tie suspects,” *Politico*, April 11, 2011, <http://www.politico.com/news/stories/0411/52901.html>.

¹⁰⁷ *Ibid.*

E. CONCLUSION

The case of Mr. Arar led to a massive official response by the government of Canada, both in the creation of the Arar Commission and in the settlement and official apology by the government in response to Mr. Arar's legal claims. The Arar Commission was created and overseen by the Canadian legislature, led by the Canadian judiciary and supported and endorsed by the Prime Minister and Canadian administration. The heft of the Commission in Canada and depth of public sentiment with regard to this case is demonstrated in part by the resignation of the RCMP Commissioner during the course of the investigation. The government has gone to significant lengths to indicate that Mr. Arar does not appear on that country's terrorist watchlists. Mr. Arar's removal continues to inform official government actors with the ability to directly affect Canadian engagement with the United States, as demonstrated by the litigation surrounding the STCA.

The depth of the Canadian reaction—including the direct challenge to, and implicit criticism of, the leadership of the United States—to the removal of Mr. Arar must also be considered in the context of two additional factors. The first is Canada's deep and necessary commitment to a free trade relationship with the United States. The second is the Canadian experience prior to September 11, 2001, with the Air India terrorist attacks, and the subsequent balance between that country's national security needs and its commitment to civil liberties as reflected in, among other official statements, Canada's 2012 counter-terrorism strategy.

In the United States, Mr. Arar failed to obtain relief against United States government officials through litigation in American courts and the official review of the actions of the United States has been conducted internally by the relevant agency, namely through the DHS OIG. He has been associated with pending terrorist prosecutions in United States military commissions and government officials have stated publicly that he remains on terrorist watchlists in this country.

At the same time, the case of the removal of Mr. Arar should be framed by current leaders in the context of homeland security developments since his removal and the two

countries' mutual and continuing commitment to the maximum alignment of immigration policy for homeland security purposes. Chapter V of this thesis concludes by recommending ways in which current initiatives set forth in the Beyond the Border action plan can be informed by a case study of the removal of Mr. Arar in order to advance the objectives of that and future engagements.

V. STRATEGIES FOR FUTURE ENGAGEMENT

This thesis set out to use the case of the removal of Mr. Arar to Jordan by the United States as a case study to derive lessons for future engagement by the United States with the government of Canada. Reflection on this case study; the natural affinity between the geography and homeland security policies of both countries as demonstrated by the recurring themes in the Smart Border Accords, SPP and now BTB; the continued commitment by both countries to informal bilateral law enforcement cooperation as set forth in the BTB action plan; and intervening changes to the countries' homeland security capabilities and policies suggest several conclusions and themes for future action.

The details of the Arar case are—and should be acknowledged officially as—an example of the dire consequences that may result from the exercise by either country of its immigration laws in support of homeland security objectives, and of the delicate balance that law enforcement professionals in the United States and Canada must achieve in emerging national security cases. Mr. Arar was interdicted in transit through the United States en route to Canada, immediately removed to a country other than his country of citizenship and destination, Canada, on the basis of classified information and was subsequently physical abused in the custody of Syrian military intelligence. This case continues to be used strategically by groups that oppose Canadian integration with United States law enforcement and security policies. At the same time, the absence of any mention of Mr. Arar's case in the countries' current BTB action plan can allow this case to continue to be used to delay or prevent achieving the countries' stated objectives of homeland security integration.

The success to date in Canadian litigation by nongovernmental organizations using the Arar case to argue that United States immigration and homeland security policy should be unacceptably severe to Canadian policymakers, and that Canada should avoid further integration with the United States, strongly suggests that policymakers in the United States should alter their public narrative with regard to this case. As an alternative, policy makers in both countries would be well served by squarely addressing this case and explaining the changes to policies in both countries that have been

implemented to prevent similar situations in the future. This messaging should acknowledge the Arar case in appropriate detail, but must—in order to remain credible—continue to muscularly assert the right and prerogative of both countries to use all available authorities to prevent the admission of individuals posing a law enforcement or terrorist threat to either country.

A. WHY THE REMOVAL OF MR. ARAR REMAINS RELEVANT TO UNITED STATES ENGAGEMENT WITH CANADA

Mr. Arar is a citizen of Canada, encountered attempting to transit the United States within a year after the terrorist attacks of September 11, 2001. His interdiction by United States authorities relied on databases and capabilities that are precursors of the systems and capabilities currently in use by a border security agency, U.S. Customs and Border Protection, which did not exist at the time of Mr. Arar's removal. Given the time elapsed since Mr. Arar's removal and the significant changes in the structure and function of relevant United States government agencies, a threshold question becomes whether this case remains relevant for the purposes of current policy analysis.

There are at least three reasons why this case remains relevant and should continue to serve as an illustrative example against which future policy and diplomatic decisions should continue to be tested.

First, the reliance by Canadian nonprofit organizations on the Maher Arar case in legal challenges to the sufficiency of United States immigration law under international human rights standards demonstrates that this case will be used in official, rather than merely rhetorical, challenges to the integration of United States and Canadian policy. Much more significantly, the success of these challenges at the trial court level and that court's specific reference to the Arar case as a basis for its conclusion that United States immigration law and policies were, in the court's judgment, insufficiently protective of international human rights requirements demonstrates that this case has the practical potential to hinder integration of policies between the two countries.

Second, the informal exchange of investigative information from Canada to the United States regarding Mr. Arar and his associates during the year prior to Mr. Arar's

removal and the contemporaneous, although intermittent, exchange of information and decision-making details during Mr. Arar's actual detention and removal are illustrative of the challenges that will have to be acknowledged and managed as the two countries continue to collaborate for law enforcement purposes. Although the Arar Commission identified specific ways in which the RCMP's exchange of information in that case failed to comply with Canadian policy, officials in both countries are advised to adopt the conservative assumption that future "informal" collaboration between the two countries may raise analogous issues that will require both countries to acknowledge and defend the need for informal collaboration going forward.

Third, the Arar case precipitated a sharp and public disagreement between the leadership of both countries regarding the treatment by the United States of a Canadian citizen believed to pose a threat to the national security of the United States. At worst, this disagreement could be characterized by those opposing integration as compelling evidence of an irreconcilable conflict between the commitment of the government of Canada to international human rights standards and the commitment of the United States to domestic security. This thesis recommends directly acknowledging and refuting this proposition, but its significance as an obstacle to future integration between the two countries should not be understated. The body of primary source material created since the removal of Mr. Arar—consisting of official inquiries in both countries, litigation by Mr. Arar, ongoing military commission proceedings in the United States and the release of information regarding this case by both countries—can and should be used to develop a narrative that explains how both countries and in particular the United States have reorganized and changed procedures in such a way as to mitigate the possibility of the interaction between the United States and Canada.

The Arar case, considered in the context of developments since September 11, 2001, presents a rich source of insight regarding the complications of actual engagement between the United States and Canada as compared to the continuous agreement on homeland security objectives by leaders of both countries demonstrated by the similarities across the Smart Border Accords, SPP and BTB. The BTB Action Plan and 2012 Canadian anti-terrorism strategy stress the simultaneous need for informal

cooperation between law enforcement in the two countries and the need for Canadian officials to respect international humanitarian obligations. In order to achieve durable progress toward the objectives of these documents, policy makers in both countries must anticipate that the commitment to international humanitarian obligations will be construed by groups opposing integration by Canada with the United States as a continuing indictment of the actions of the United States in the removal of Mr. Arar.

B. HOW THE CASE OF THE REMOVAL OF MR. ARAR CAN BE ADDRESSED AND USED TO ADVANCE BILATERAL OBJECTIVES

To date, the government of the United States has vigorously defended during litigation its actions in removing Mr. Arar to Jordan, and has stated publicly and repeatedly the Mr. Arar should continue to be placed on the United States terrorist watchlist. The following policy recommendations are not intended to apply to the particular case of Mr. Arar and are not meant to judge the government's past, current or future decisions with regard to his admissibility or the threat, if any, that he may continue to pose to the security of the United States. However these recommendations reflect the fact that his case has been and may continue to be used to argue that the United States and Canada should proceed with caution, or not at all, to further integrate the countries' homeland security policies. They are intended to be generally applicable and to advance the current and future objectives of the United States.

One of the key lessons to take from the case study of Mr. Arar is the speed with which law enforcement decisions may be required in the context of border security. In this case, Canadian law enforcement were involved in an investigation for several months prior to September 2002 in which Mr. Arar was a subject of interest. Upon Mr. Arar's arrival in the United States in transit to Montreal, United States immigration and law enforcement authorities were required to determine—based on all available information—whether Mr. Arar was admissible and, having determined he was inadmissible on national security grounds, the country to which he should be removed. The informal cooperation between law enforcement in both countries encouraged by Beyond the Border was instrumental in providing American authorities with access to information in the possession of Canadian counterparts. A cooperative, productive

relationship between the two countries that incorporates the lessons learned from the case study will situate both countries to preempt or address the next analogous situation regardless of the environment in which it arises or the individuals involved.

In addition to the following specific recommendations, leaders in both countries would be well served by awareness of the case of Mr. Arar to formulate future engagement strategies.

First, career and political government officials in the United States involved in engagement with Canada should proceed with an understanding of that country's homeland security perspective. Prior to September 11, 2001, Canadians lived with the experience of the deadliest act of aviation terrorism in the world to that date, the Air India bombing, and the unsuccessful prosecution of the Sikh separatists accused with the attack. Following the terrorist attacks of September 11, 2001, Canadians expressed deep and immediate solidarity with the anti-terrorism objectives of the United States as demonstrated first by the security objectives of the 2001 Smart Border action plan and prompt movement to execute bilateral agreements such as the STCA in 2002. Following Mr. Arar's return to Canada in 2003, however, the details of his removal to Jordan by the United States and the actions of the RCMP and Canadian officials to provide information to American law enforcement were extensively debated and disputed, resulting in the resignation of the Commissioner of the RCMP and culminating in a public apology by the Prime Minister to Mr. Arar and public rebuke to the decision by the United States to keep Mr. Arar on the terrorist watchlist.

Political leaders in both countries have, for years, communicated to government agencies the necessity of achieving border security in a manner which does not impose burdens on commerce beyond those which may be necessary. There is a natural affinity between this objective and an understanding of the lessons implicit in the case of Mr. Arar's removal. In a number of conceivable scenarios, border security professionals will be faced with the need to corroborate or contradict derogatory information regarding a particular individual seeking admission to either country. In many cases, the informal relationships among law enforcement professionals in both countries that are prioritized in the BTB Action Plan will be critical to the prompt resolution of questionable cases.

The failure to directly address lingering issues surrounding the removal of Mr. Arar will interfere with developing and maintaining effective informal relationships. To the extent that these relationships do not exist, close cases will require additional time to resolve. Additional time to resolve such cases will translate directly into a more congested border which in turn will increase the time and costs of moving goods between the countries. More generally, a candid reflection on the case of Mr. Arar has the potential to greatly improve the trust and efficiency within relationships between United States and Canadian partners—relationships strained during and after the removal of Mr. Arar as demonstrated most vividly by the Prime Minister’s direct rebuke to American actions following Mr. Arar’s return to Canada. Such increased trust and efficiency has the potential to directly minimize the time and costs necessary to transit the border between the two countries by more quickly resolving cases that may pose close factual questions.

Second, certain developments since the removal of Mr. Arar in 2002 should be emphasized in public and official discussion of the reasons why further integration of United States and Canadian immigration policy is both appropriate and beneficial. These included specifically the increased capabilities of the United States to detect individuals posing a terrorist or law enforcement threat prior to departure to the United States, and therefore either preventing individuals from traveling to the United States or increasing the ability of United States law enforcement to adjudicate the admissibility of individuals seeking to enter the United States. The creation and policy recommendations in 2009 of the task force on interrogation and transfer policy recommendations serve as a United States analogue to the recommendations of the Arar Commission that were adopted by the government of Canada following the issuance of that report in 2006.

A critical reading of the most recent Canadian anti-terrorism strategy, however, highlights one area for caution in future engagement between the two countries. That document states explicitly that anti-terrorism operations, including coordination with the United States, should conform with Canada’s international legal obligations but does not state what those obligations are or, significantly, are not. The case of Mr. Arar’s removal from the United States has been used by Canadian non-governmental organizations to argue, with limited success, that the United States immigration system inadequately

protects rights guaranteed by international legal obligations. While those arguments did not, as discussed previously, ultimately lead the Canadian legal system to vacate the STCA, there is a clear precedent for the use of Mr. Arar's case in combination with an aggressive interpretation of international legal obligations as a wedge to prevent further integration of the immigration and homeland security policies of both countries. One element of constructive engagement between the government of the United States and Canada would be to clarify precisely those international legal obligations which bound and direct Canadian anti-terrorism policy and a clear explanation of the procedures and capabilities now in place in the United States to handle cases presenting analogous facts to those in the case of Mr. Arar.

Third, the progression of official action plans between the United States and Canada since 2001 from the Smart Border action plan through the Security and Prosperity Partnership and the Beyond the Border Action Plan reinforce the conclusion that United States and Canadian policy makers have been, and continue to be, in agreement regarding the general propositions required to enhance the security of both countries while expediting the travel of legitimate travelers and cargo. At the same time, official action plans and documents issued since 2002 do not explicitly mention the case of Mr. Arar; Canada's 2012 counter-terrorism strategy, for example, states the policy of the government of Canada to adhere to the findings of the official inquiry into the Air India case but does not reference the case of Mr. Arar. Individuals and organizations seeking to prevent further integration between the two countries have, by comparison, demonstrated their continuing willingness to rely publicly on the case of Mr. Arar to apply pressure to the governments of each country. Given the extensive public record, each country would do well to squarely address the case and current posture and policies of the governments of the United States and Canada in public discussion of Beyond the Border and similar future strategic engagements.

This thesis deliberately does not suggest that the two countries should explicitly seek to harmonize admissibility policies and requirements where gaps currently exist between the laws of both countries. Since the terrorist attacks of September 11, 2001, Canada and the United States have successfully executed targeted agreements to achieve

efficient outcomes in certain categories of cases without altering the underlying law in each country. The Safe Third Country Agreement is a prime example of this approach. This framework has demonstrated success and the potential for future progress in particular areas. Operationally, the success by U.S. Customs and Border Protection in positioning United States officers in Canadian airports to conduct advance clearance of individuals destined for the United States is another example of tangible, incremental integration between the two countries which does not require change to the countries' underlying decisions, reflected in statute, regarding what individuals should be admitted to either country. However, the ultimate goal of harmonization between the immigration laws of each country—identified implicitly by the language of HSPD 2—is an aspiration which, in the attempt, presents the near-term risk of preventing more tangible progress between the two countries. The public statements by Canadian leaders following the return of Mr. Arar following his interrogation by Syrian military intelligence demonstrate the (understandable and appropriate) emphasis placed by the government of Canada on the protection of Canadian citizens and adherence to Canadian principles of human rights where there may be differences with regard to United States law or objectives.

Fourth, an understanding of Mr. Arar's case will allow decision makers in both countries to appreciate the complexity, and considerable potential, involved in further integration of the homeland security policies of both countries. The Smart Border Accords, SPP and most recently BTB Action Plan all emphasize the need to simultaneously increase economic integration while adopting similar policies and technologies to achieve border security, such as the BTB Action Plan's commitment to sharing United States border targeting technology and techniques with the Canadian government. This parallel economic and security partnership is a clear function of the common borders of both countries as well as the tight alignment between the economic and security interests of each.

As the Arar case study demonstrates, however, cases may arise which will require authorities to weigh each country's national security interests against the benefits associated with alignment between national policies. Mr. Arar, as a Canadian citizen, was entitled to the full political and diplomatic efforts of the government of Canada to

ensure that his treatment while in the custody of the United States, during his removal from the United States and during his subsequent custody and interrogation by Syrian military intelligence. The forcefulness and substance of statements of the government of Canada following Mr. Arar's release from Syrian custody and return to Canada illustrate that country's commitment both to the well-being of its citizens as well as the projection of Canadian interests abroad in furtherance of that country's values, such as its stated commitments to abide by certain norms of international human rights law. Simultaneously, United States officials were obliged to review both classified and unclassified information to draw a conclusion regarding the threat posed by Mr. Arar, and then to decide how to exercise the considerable discretion conferred by United States immigration law to determine the country to which Mr. Arar would be removed. These decisions occurred following more than a year of investigation of Mr. Arar by Canadian authorities and informal collaboration between Canadian and United States law enforcement—collaboration which, parenthetically, continues to be explicitly promoted by the BTB Action Plan.

The relevant lesson to be drawn from the case of Mr. Arar's removal is that decision makers should remain mindful during internal deliberations and public messaging regarding particular national security cases of the considerable affinity between the two countries. United States and Canadian officials will continue to be faced with situations in which either country must render a decision that is required, in the judgment of those authorities, by the national security of either the United States or Canada. In many cases, officials should anticipate that such situations may involve citizens of the other country and may require decisions that are contrary to the wishes of the other country's government. Rather than proceed under the assumption that such situations will never arise, officials should remember the case of Mr. Arar and develop contingency plans for public and diplomatic messaging when such cases do arise.

It is recommended that the same principles of common economic and security interest that have consistently been articulated through the Smart Border Accords, SPP and the BTB Action Plan be used as the foundation for messaging and action along the following lines: while each country will continue to exercise the full range of its

authorities to ensure the continued security of its citizens and its borders, no one decision should obscure the unique and continuing commitment of both countries to economic and security integration to the maximum extent possible under the political and legal systems of both countries. Internally, this strategy can be implemented by more timely and more informational updates regarding the basis for one country's decision to officials of the other country than occurred in the case of Mr. Arar. Since Mr. Arar's removal by the United States, the two countries have successfully implemented limited harmonization agreements such as the STCA, and the continued success of this agreement should be understood as proof of the concept that the two countries can integrate to a certain extent. Since the removal of Mr. Arar, the United States government commissioned the Special Task Force on Interrogations and Transfer Policies which in August 2009 delivered targeted recommendations for modification to policies governing removal of foreign nationals by the United States government. Given the continuing use by certain groups of the removal of Mr. Arar as an argument against further bilateral integration between the United States and Canada, United States officials would be well served by referencing this task force's recommendations as the basis for future protections that could be adopted to mitigate against the risk of a recurrence of cases such as that of Mr. Arar.

In closing, the removal of Mr. Arar by the United States encapsulates in one case many of the issues associated with the homeland security objectives of HSPD 2. Occurring one year after the attacks of September 11, 2001, this case required the United States government to exercise the full extent of its immigration judgment and discretion in a case where classified and unclassified information suggested that a citizen of Canada posed a threat to the United States and to decide whether to return Mr. Arar to Canada or some other country selected by the government of the United States. Mr. Arar's removal to Jordan, transfer to the custody of Syrian military intelligence and subsequent abuse and interrogation place the decisions of the United States in harsh relief.

Certain groups have already used this case to make the argument that the immigration and security policies of the two countries are, at some level, incompatible either with the partner's values or with norms of international human rights. These arguments, and their limited success, are demonstrated by the litigation surrounding

implementation of the STCA. The continued efforts by both countries to achieve further integration, however, demonstrate that the leaders of both countries believe that further integration is not only possible, but that it may be consistent with the values of each country and would be in the considerable economic and national security interests of each. This thesis has provided a narration of the case of Mr. Arar, based on the considerable amount of United States and American material that has become available, and placed this case in the context of subsequent developments such as the STCA, the military commission trial of Omar Khadr and the Special Task Force on Interrogations and Transfer Policies. It concludes by recommending that officials concede the seriousness of the case of Mr. Arar and the severity of his allegations, while squarely addressing both the changes that have occurred in each country and the commitment of both to homeland security and border security integration which respects the continuing prerogative of the United States and Canada to ensure the well-being of safety of the citizens of each.

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